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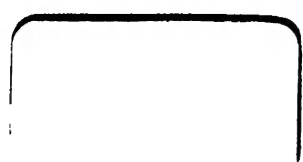
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THE COMPILERS.



# PREFACE.

---

THIS volume is a complete Digest of all reported decisions relating to mining and mining company matters in the Courts of the Australasian Colonies to the end of 1896. A few cases of importance decided during the present year, which affect decisions in earlier cases, have also been inserted.

The work has been based on M'Farland's "Digest of the Law of Mining in Victoria," the last edition of which was published in 1881. That admirable work has formed the material for the present for all the Victorian cases decided between 1858 and 1880. The cases there noted have been carefully revised and re-arranged in some instances under more suitable headings, with a view to conciseness, *e.g.* such subjects as Appeal, Certiorari, Chief Judge, Costs, Court of Mines, Injunction, Prohibition, Special Case, Warden, &c., have been grouped under one heading, Practice. Reported Victorian cases decided prior to 1858, and not included in M'Farland's work, have also been added.

The present work is the first of its kind, and should prove of value to practitioners and others throughout all the Australasian Colonies, owing to the similarity of the legislation in all the Colonies on the subject.

In each case the name of the judge or court has been added, together with the date of the decision, and initial letters indicating the name of the colony. Not only have all the principles decided in a case been extracted from the reports, but also all valuable *dicta* of individual judges.

## PREFACE.

The cases collected have been arranged under appropriate headings, with numerous cross-references in order to facilitate search. With the same object the general Index of Cases has been made a double one. A feature of the work is a table (also double) of cases followed, approved of, overruled, and otherwise judicially commented upon. A table of Statutes referred to has also been added.

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## ABBREVIATIONS USED IN THIS VOLUME.

- A.C. (with date).—Law Reports Appeal Cases for year mentioned.
- A.J.R.—Australian Jurist Reports.
- A.L.R.—Argus Law Reports.
- A.L.T.—Australian Law Times.
- App. Cas.—Law Reports Appeal Cases.
- A.R.—Argus (newspaper) Reports.
- Atk.—Atkyn's Reports.
- B. & Ad.—Barnewall and Adolphus' Reports.
- B.C.—Bankruptcy Company and Probate Cases (N.S.W.)
- B. & S.—Best and Smith's Reports.
- C.A.—Court of Appeal.
- C.B.N.S.—Common Bench Reports, New Series.
- Ch. (with date).—Law Reports Chancery Division, for year mentioned.
- Ch. D.—Law Reports Chancery Division, or Chancery Division.
- C.L.J.—Colonial Law Journal (N.Z.)
- De G. & J.—De Gex and Jones's Reports.
- De G.J. & S.—De Gex, Jones and Smith's Reports.
- E. & B.—Ellis and Blackburn's Reports.
- Ex.—Exchequer Reports.
- F.C.—Full Court.
- H.L.C.—House of Lords Cases.
- H. & N.—Hurlstone and Norman's Reports.
- J.C.—Judicial Committee of the Privy Council.
- Jur. N.S.—Jurist Reports, New Series.
- Knox.—Knox's Reports (N.S.W.)
- L.J.P.C.—Law Journal Reports Privy Council.
- L.J.Q.B.—Law Journal Reports Queen's Bench.
- L.R. Ch.—Law Reports Chancery Appeals.
- L.R.C.P.—Law Reports Common Pleas.
- L.R. Eq.—Law Reports Equity.
- L.R.H.L.—Law Reports House of Lords.
- L.R.Q.B.—Law Reports Queen's Bench.
- L.R.P.C.—Law Reports Privy Council.
- L.T.—Law Times.
- L.T. (N.S.)—Law Times (New Series).
- Mac.—Macassey's Reports (N.Z.)
- M. & W.—Meeson and Welsby's Reports.
- Mer.—Merivale's Reports.
- Moo. P.C.—Moore's Privy Council Cases.
- N.C.—Notes of Cases (printed in Vol. I. of Australian Jurist).
- N.S.W.B.C. or B.C. simply.—New South Wales Bankruptcy, Company and Probate Cases.
- N.S.W.L.R.—New South Wales Law Reports.
- N.S.W.S.C.R.—New South Wales Supreme Court Reports.
- N.S.W.S.C.R. App.—New South Wales Supreme Court Reports Appendix.
- N.S.W.S.C.R.N.S.—New South Wales Supreme Court Reports New Series.
- N.S.W.W.N. or W.N. simply.—New South Wales Weekly Notes.
- N.Z.C.A.—New Zealand Court of Appeal Reports.
- N.Z.J.R.—New Zealand Jurist Reports.
- N.Z.J.R. (N.S.) M.L.—New Zealand Jurist Reports (New Series) Mining Law.
- N.Z.J.R. (N.S.) S.C.—New Zealand Jurist Reports (New Series) Supreme Court.
- N.Z.L.R.—New Zealand Law Reports.
- N.Z.L.R.C.A.—New Zealand Law Reports Court of Appeal.
- N.Z.L.R.S.C.—New Zealand Law Reports Supreme Court.
- Plowd.—Plowden's Reports.
- Q.B.—Queen's Bench Reports.
- Q.B.D.—Law Reports Queen's Bench Division or Queen's Bench Division.
- Q.L.J.—Queensland Law Journal.
- Q.L.J. App.—Queensland Law Journal Appendix to Vol. I.
- Q.L.J. (N.C.)—Queensland Law Journal (Notes of Cases).
- Q.L.R.—Queensland Law Reports.
- R.—The Reports.
- S.A.L.R.—South Australia Law Reports.
- Ves.—Vesey's Reports.
- V.L.R.—Victorian Law Reports.
- V.L.T.—Victoria Law Times.
- V.R.—Victorian Reports.
- W.N.—Weekly Notes (N.S.W.)
- W.R.—Weekly Reporter.
- W. & W.—Wyatt and Webb's Reports (Vic.)
- W.W. & A'B.—Wyatt, Webb and A'Beckett's Reports (Vic.)

## ADDENDA.

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- COL. 9—Arbitration, 4.]—Add reference to 10 W.N., 12.
- „ 10—Arbitration, 5.]—Add reference to 10 W.N., 89.
- „ 10—Arbitration, 6.]—Add references to 11 W.N., 139 and 5 B.C., 77.
- „ 27—Champerty.]—Add *see* also SOLICITOR, 2.
- „ 38—Claim, 31.]—*Williams v. Morgan* has been affirmed in *Williams v. Morgan*, 13 App. Cas., 238, J.C. (1888), where *Queen v. Cribb*, followed by the Court below, is also approved.
- „ 44—Company, 2.]—Add reference to 3 B.C., 1.
- „ 69—Company, 81, 82.]—Add reference to 1 W.N., 135.
- „ 70—Company, 83.]—Add reference to 6 W.N., 136.
- „ 81—Company, 130.]—Add reference to 2 B.C., 37.
- COLS. 81, 82—Company, 131, 132.]—Add reference to 5 B.C., 90. And *see* COMPANY, 301; and ULTRA VIRES, 2.
- „ 78-80—Company, 122-126.]—Add, but *see* *Homeward Bound G.M. Co. v. McPherson* 17 N.S.W.L.R. (E.), 281, 289; REGISTRATION, 10.
- COL. 83—Company, 142.]—Add reference to 6 W.N., 110.
- „ 112—Company, 229.]—Add reference to 3 W.N., 20.
- „ 114—Company, 234.]—Add reference to 5 W.N., 127.
- COL. 114—Company, 235.]—Add reference to 6 W.N., 100.
- „ 114—Company, 236.]—Add reference to 6 W.N., 77.
- „ 115—Company, 237.]—Add reference to 3 B.C., 43.
- „ 116—Company, 238.]—Add reference to 9 W.N., 80.
- „ 116—Company, 239.]—Add references to 4 B.C., 1, 31; 7 B.C., 6.
- „ 116—Company, 240.]—Add reference to 10 W.N., 191.
- „ 116—Company, 241.]—Add reference to 11 W.N., 66.
- COLS. 127, 128—Company, 283, 284.]—Add reference to 11 W.N., 30.
- COL. 132—Company, 301.]—*Creswick Grand Trunk Co. v. Hassall*, has been distinguished by the Full Court in *Ellson v. Ivanhoe G.M. Co.*, 3 A.L.R., 209. *See* ULTRA VIRES, 2; *see* also COMPANY, 131.
- „ 133—Company, 305.]—Add, but *see* 371, *infra*, and NO-LIABILITY COMPANY, 6.
- „ 153—Company, 371.]—Add reference to 3 B.C., 85. *See* NO-LIABILITY COMPANY, 6.
- COLS. 153, 154—Company, 372, 372a.]—Add references to 4 B.C., 1, 31.
- „ 153, 154—Company, 372b.]—Add reference to 7 B.C., 6.
- COL. 177—Contract, 9.]—Add reference to 7 W.N., 153.
- „ 236—Freehold.]—Add reference to A.R., 29th July, 1892.

COL. 244—**Insolvency—Bankruptcy Act 1887** (51 Vic. No. 19), secs. 3 (1), 52 (iii.)—**Mining Act 1874** (37 Vic. No. 13), secs. 2, 15, 17, 18, 21, 22, 23, 66 (5)—**Regulations December, 1875—Business License—Order and disposition—Lien.**]—Land held under a business license granted under the *Mining Act* is not subject to the provisions of sec. 52 (iii.) of the *Bankruptcy Act*. A business license may be encumbered. K., for valuable consideration, gave J. a lien over certain premises held by K. under a business license. K. subsequently became bankrupt, and at the commencement of the bankruptcy was in possession of the premises. *Held*, that K. was not the reputed owner of the premises, and that J. had a valid charge upon the land. *Colonial Bank v. Whinney*, 11 App. Cas., 426 (1886), followed. *Re Keith, ex parte Joss*, 7 N.S.W.B.C., 75. *A. H. Simpson, J.* (1897).

N.S.W.

„ 276—**License.**]—*See Re Keith, ex parte Joss*, 7 B.C., 75, *supra*.

„ 379—**Lien.**]—*See Re Keith, ex parte Joss*, 7 B.C., 75, *supra*.

„ 289—**Miner's Right, 8.]—Mackeprang v. Watson** has been distinguished in *Adams v. D'Outrebande*, 13 N.S.W.W.N., 238. *G. B. Simpson and Cohen, JJ.* Banco (1897). N.S.W.

„ 289—**Miner's Right, 10.]—See TRUSTS, 5.**

„ 292—**Miner's Right, 21.]—See TRUSTS, 5.**

„ 299—**Miner's Right, 40, 41, 42.]—Add reference to 7 B.C., 30.**

„ 307—**Mining Tenement.]—Semble**, a mining tenement is not a *chose-in-action*. *Re Keith ex parte Joss*, 7 N.S.W.B.C., 75. *A. H. Simpson, J.* (1897). N.S.W.

„ 332—**Partnership—Mining—Bankruptcy or death of partner—Dissolution—Partnership Act 1891, sec. 36—Mining Act 1891, sec. 183.]—Sec. 36 of the Partnership Act 1891**, which provides that every partnership is dissolved by the

death or bankruptcy of any partner, does not apply to mining partnerships. The difference between ordinary and mining partnerships discussed. *Stewart v. Nelson*, 15 N.Z.L.R., 637 (October Part, 1897). *Williams, J.* (1895). N.Z.

COL. 334—**Patent—Cyanide process—Specification—Amendment—Claim to reduce strength of cyanide used in solution.]—**The appellants on an appeal from the Registrar of Patents, who had refused an amendment in the specification of their patent, claimed the use of free cyanide in solution and the use of cyanide producing substances to the extent necessary for the purpose of producing cyanide. It was objected that they had not set forth in their specifications the chemical equivalents of each such cyanide producing substances. *Held*, that it was no more incumbent upon the appellants to set out the chemical equivalents of each cyanide producing substance, more especially as it was in fact impossible to do so, than it was necessary to set out the process by which their cyanide could be produced; they could claim the use of the cyanide either in its free state or diluted, and as they sought merely to reduce the strength of the solution claimed, they were at perfect liberty to do so. The specification would be amended in that direction and the appeal allowed. *Re Cassell Gold Extracting Co., New Zealand Herald*, 4th June, 1897. *Edwards, J.* [NOTE.—The Full Court of the Transvaal, South Africa, has held the original patent in connection with this process, known as the MacArthur-Forrest Patent, to be invalid, on various grounds, including that of want of novelty. *See* full text of judgment, in *Australian Mining Standard*, January 21st and 28th, 1897, where the history of the patent is reviewed. In the New Zealand case, *Edwards, J.*, while allowing the amendment sought, said that he did so without expressing any opinion as to the validity of the original patent.]

N.Z.

„ 481—**Tailings.]—A company worked land**

for gold mining purposes under a lease from the Crown, and as a result of such working a considerable quantity of quartz tailings were accumulated on the land. The company ceased working in 1890. In 1897 the company brought an action against the defendants for converting to their own use these tailings. It appeared in evidence before the County Court judge that the defendants occupied the land as a residence area. The judge found as facts that the tailings were not sold to the defendants by the plaintiff company and that the plaintiff company did not abandon their right, if any, to the tailings. *Held*, on questions reserved—(1). On the authority of *Northam v. Bowden*, 11 Ex., 70, that the plaintiff company, at the commencement of the action, had such possession of the tailings as would support the action, they not having abandoned their right to extract ore from the heap which had been separated from the freehold for such purpose, the defendants having proved no title in themselves. (2). That the Crown was not a necessary party to the action. (3). That certain

registrations of the tailings by the manager of the plaintiff company were some evidence that they had not abandoned their right, although such registrations would not be evidence of title; and (4). That the occupation of the residence area gave the defendants no right to the heap as against the plaintiff company. *Sydenham Q.G.M. Co. v. Ah Cheong and Wong Ying* (unreported), 17th Nov., 1897. F.C., *Williams a'Beckett and Hodges, JJ.* [NOTE.—*Wallace Bethanga Co. v. Robinson*, was referred to during the argument in this case, but not mentioned in the judgment of the Court. As there is only a newspaper report of the *Wallace Bethanga Case* it may be mentioned that that case subsequently came on for re-hearing before *Williams, J.* (see A.R., 29th July, 1892), who found certain facts and reserved the whole case for the opinion of the Full Court. The case, however, was subsequently settled.]

V.

COL. 508—*Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co.*, is now reported, 3 A.L.R., 231.

## ERRATA.

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|--|---|
| COL. 30, line 9—For “333,” read “233.”   | COL. 274, line 2— <i>Delete</i> Notice.                                 |
| „ 54, line 25—For “437,” read “407.”   | „ 285, line 22—For “1867,” read “1857.”                                 |
| „ 56, lines 24-27—For “40 Vic. No. 1,” read<br>“36 Vic. No. 33.”                                       | „ 315, line 24—For “1878,” read “1877.”                                 |
| „ 69, line 12—For “9,” read “19.”  | „ 317, line 20 from bottom—For “1871,” read<br>“1881.”                  |
| „ 76, line 12 from bottom—For “ <i>Bowman v.</i><br><i>Farran</i> ,” read “ <i>Farran v. Bowman</i> .” | „ 364, line 6—For “74,” read “174.”                                     |
| „ 114, line 10—For “46,” read “44.”  | „ 372, line 18—For “34,” read “56.”                                     |
| „ 130, line 13 from bottom—For “20,” read<br>“42.”   | „ 384, line 13 from bottom—For “7,” read<br>“27.”                       |
| „ 165, line 24—For “8,” read “10.”   | „ 387, line 2 from bottom—For “1857,” read<br>“1853.”                   |
| „ 192, last line—For “15,” read “18.”  | „ 421, line 15—For “128,” read “148.”                                   |
| „ 200, lines 15 and 17 from bottom—For “17,”<br>read “67.”   | „ 485, line 2—For “sec.,” read “secs.” and<br><i>delete</i> “sub-secs.” |

# Digest

OF

## AUSTRALASIAN

# MINING CASES

AS DECIDED

IN THE SUPREME COURTS OF VICTORIA, NEW SOUTH WALES,  
QUEENSLAND, SOUTH AUSTRALIA, AND  
NEW ZEALAND,

AND ON APPEAL THEREFROM TO THE PRIVY COUNCIL.

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### ABANDONMENT

*See BY-LAWS AND REGULATIONS; FORFEITURE;  
TAILINGS; TRESPASS.*

1.—**Claimholder—Evidence—Lease—Warden's order—Decision of assessors—Estoppel—No. 148—No. 291, sec. 193.**—The W. company were the beneficial owners of a claim registered in the names of Meglin and others. J. applied for a lease of the ground under the Act No. 148, as a trustee for the company. The lease was issued on the 24th July, 1865. Through some inadvertence the lease did not include the whole of the claim, but a small triangular section was omitted. H., in Sept., 1865, heard of the omission, took up the omitted section as a claim, known as the spare ground, and registered himself and partner as the owners. The company had a shaft in use on this spare ground, near the boundary line of the lease, and were using some of the land beyond for their spoil heaps. On the 23rd Oct., 1865, H. applied to the Warden to be placed in possession of the spare ground, as unlawfully occupied by the defendants. The Warden refused the application, and found that

the ground was lawfully occupied by the defendants. This decision was not appealed from. H. continued working on the ground, and the W. company sued before the Warden and assessors to have H. removed; the majority of the assessors found that the defendant had not encroached on the ground of the plaintiffs, and adjudged accordingly. This decision was never entered as the decision of the Warden, nor was any order made thereon, or minuted by him in accordance with No. 291, sec. 193. From this finding there was an appeal to the Court of Mines. The Court of Mines reversed the decision. A prohibition was obtained from the Supreme Court against the Judge of the Court of Mines, prohibiting him from carrying out his decision, on the ground that there was no appeal under the Statute No. 291, from a decision of assessors to the Court of Mines. A suit in equity was then instituted by H. to restrain the W. company from working the spare ground, and for an account of gold taken therefrom. In this suit H. was successful. The W. company appealed to the Full Court and were defeated. They further appealed to the Privy Council.

*Held*, by the Privy Council on appeal that (1.) The holder of a claim under a miner's right, is for all mining purposes possessed of the claim for a permanent estate, determinable only by voluntary abandonment, *de facto*, or by those breaches of conditions which amount to a constructive abandonment or forfeiture. (2.) Intentional abandonment is only to be proved by cogent evidence of the existence of that intention, evidence of express declaration or unambiguous acts or conduct; on the other hand, the very smallest act *animo possidendi* is sufficient to negative such intention. In the absence of strong evidence to the contrary, or of some adverse possession, the continued possession of any part of any district of land held under one title is itself continued possession of the whole. (3.) The lease to J. had no legal operation on the claim right, and was no evidence of intentional abandonment of any part of the claim. (4.) The Warden's decision of the 23rd Oct., 1865, standing unreversed was an adjudication of right between the parties. (5.) The verdict of the assessors not followed by any judgment of the Court (the Warden) was not admissible as a verdict for any purpose; was not an estoppel, and was, under the circumstances, of no weight whatever as a finding. (6.) H.'s bill should be dismissed. *Mulcahy and Humphreys v. Walhalla G.M. Co.*, 2 A.J.R., 93; 40 L.J.P.C., 41. Privy Council (1871). V.

2.—Extended sluicing claim—Abandonment—Adjudication of forfeiture.]—An extended sluicing claim duly applied for under by-law 3, subsec. 8, and registered under by-law 10 of the Castlemaine by-laws, can be taken possession of as abandoned ground without an adjudication of forfeiture, if abandoned *de facto*, but if the suspension of work is *bona fide* for want of sufficient water, this will not amount to an abandonment. The Warden could entertain the question of abandonment, or the defendant's subsequent registration for the ground in question. *Harders v. Abbott*, 9 A.L.T., 152. *Webb, J.* (1887). V.

3.—Of water-race—Merger in freehold.]—A water-race which runs through private property, when abandoned, merges in the freehold, discharged from all rights of user for mining purposes; and if any person desires to use it as a water-race he must take the same steps to acquire it as if he were about to cut a new race. *Reg.*

*v. Keddell*, N.Z.L.R., 1 S.C., 185. *Williams, J.* (1882). N.Z.

4.—Residence area—Transfer to company—Marking out.]—See RESIDENCE AREA.

5.—Of claim—By-laws—Miner's right.]—See CLAIM, 26.

6.—Abandonment—Revenues from mines of gold and silver—Prerogative—Effect of gold-fields legislation.]—See CROWN; CRIMINAL LAW.

7.—Death of claim-holder—Forfeiture.]—See CLAIM, 33.

8.—Partnership—Abandonment of claim by partner.]—See PARTNERSHIP.

9.—Partnership—Abandonment—Retaking of claim by one partner.]—See PARTNERSHIP.

10.—Water-race—Abandonment in fact of part—Jurisdiction of Warden to restrain interference.]—See WATER.

## ABSENT DEFENDANT

See PRACTICE.

## ACCIDENT

See EMPLOYER AND EMPLOYEE.

Adjacent mines—Accidental encroachment—Damages.]—See TRESPASS.

## ACCOUNT

See PRIVATE PROPERTY; PARTNERSHIP.

1.—Account.]—The Act No. 291 does not provide for judges of Courts of Mines making decrees to account. *Albion Co. v. St. George United Co.*, 4 W. W. & A'B. (M.), 60. *Molesworth, J.* (1867). V.

2.—Covenant in lease to keep accounts—Omission—Presumption.]—See LEASE.

## ACQUIESCENCE

See ESTOPPEL.

## ACTION

See PRACTICE.



## ADJOURNMENT

See PRACTICE (WARDEN).

## ADMINISTRATOR

**Administrator—Transfer of claim—Registration.**—Goldfields regulations provided that a claim on the death of its holders should be "protected" for the benefit of his personal representatives. *Held*, that letters of administration need not be registered as a transfer under the regulations. *Woodward v. Earle*, 2 N.Z.J.R., 12. N.Z.

## ADVERSE POSSESSION

See CROWN; POSSESSION; PRACTICE.

## ADVERTISEMENT

See COMPANY, I.

**Of sale of shares—Limitation of actions after.]**  
—See COMPANY.

## AFFIDAVIT

See EVIDENCE; PRACTICE.

1.—**Affidavit.**—The omission to seal an affidavit with the proper seal may be amended. *Wilson v. Broadfoot*, 2 W. & W. (L.), 96. Banco (1863). V.

2.—**Special case—Additional affidavits.]—See PRACTICE.**

## AGENT

See PRINCIPAL AND AGENT; COMPANY.

1.—**Residence area—Occupation by agent.]—See OCCUPATION; RESIDENCE AREA.**

2.—**Goldfields Act 1866 (N.Z.), (30 Vic. No. 32) — Business license — Mining agent.] — See LICENSE; PRINCIPAL AND AGENT; WORDS.**

## AGREEMENT

See CONTRACT.

## ALIEN

**Proclamation limiting right to mine—Goldfields Act of 1861, secs. 5, 8.]—A proclamation prohibiting any Chinese alien, holder of a miner's right, from mining in certain specified portions of goldfields, is valid and authorised by sec. 5 of the Goldfields Act of 1861, 25 Vic. No. 4 (repealed). And any such alien holding a miner's right, issued before the date of the proclamation, is liable to a penalty, under sec. 8 of the Act, if he mines for gold in a place named in such proclamation (*per Stephen, C.J.*, and *Milford, J.*, *Wise, J.*, *diss.*) *Ex parte Ah Tchin*, 3 N.S.W. S.C.R. (L.), 226 (1864). N.S.W.**

## ALLOTMENT

See COMPANY.

## ALLUVIAL

**Quartz prospecting claim—Labour conditions.]**  
—See CLAIM.

## AMALGAM PLATES

**Amalgam plates—Gold attaching to—Property in—Custom—Damage to plates.]—See GOLD.**

## AMALGAMATED CLAIM

See BY-LAWS AND REGULATIONS; CLAIM; FORTIFICE; PRACTICE; TRESPASS.

**Mining Statute 1865 (No. 291), sec. 7—Amalgamated quartz claim—Width—Application to re-register—Prior titles.]—See CLAIM; REGISTRATION; TITLE.**

## AMALGAMATION

**Amalgamation of companies—Shareholder repudiating amalgamation.]—See COMPANY.**

## AMBIGUITY

**Ambiguity — Fraud — Prospectus — Paid-up shares—Material facts.]—See COMPANY.**

**AMENDMENT***See PRACTICE.***APPEAL***See PRACTICE.***APPLICATION**

1. — Application — Company — Shares.] — *See COMPANY.*

2. — Application — Lease — Forfeiture — Marking out.] — *See LEASE.*

3. — Default in application for lease — Deposit for survey of interior lines.] — *See LEASE.*

4. — Application — Lease — Marking out — Compliance with regulations — Priority.] — *See LEASE.*

5. — Marking out claim pending application for lease.] — *See CLAIM ; LEASE.*

6. — Mining lease — Notice to person in occupation.] — *See LEASE ; NOTICE.*

7. — Trespass pending application for lease — Marking out residence area.] — *See LEASE ; RESIDENCE AREA ; TRESPASS.*

8. — Application for lease — Default.] — *See LEASE.*

9. — Mines Act 1890 No. 2 (No. 1202), secs. 4, 5, 6, 7, 8, 9 — Mines Act 1891 No. 2 (No. 1251), secs. 5, 6, 19 — Applicant for mineral lease — Right to have compensation determined.] — *See COMPENSATION ; LEASE.*

10. — Applicant for lease — Right to have compensation determined.] — *See COMPENSATION ; LEASE.*

11. — Application — Lease — Miner's rights — Subsequent proclamation of goldfield — N.S.W. Goldfields Act of 1866, sec. 7.] — *See LEASE.*

12. — Application not tendered in person — Mineral selection — Waiver of Crown.] — *See CROWN LANDS.*

13. — Application — Gold mining lease — Land pegged out — Boundaries — Application.] — *See LEASE.*

14. — Application — Mineral lease — Failure to execute leases — Cancellation — Regulations.] — *See LEASE.*

15. — Pastoral lease — Exchange of freehold lands — Approval of Minister — Withdrawal of application.] — *See CROWN LANDS.*

16. — Mining lease — Application — Priority.] — *See LEASE ; PRIORITY.*

**APPORTIONMENT***See PRACTICE.***ARBITRATION**

1. — Arbitration — Action on award — Reference by Government to arbitrators to ascertain sum to be placed on the estimates — Award directing payment by Government — *Ultra vires.*] — It was resolved by the Legislative Assembly that an address should be presented to the Governor praying that His Excellency would be pleased to cause to be placed on the estimates for 1874, a sum of money, to be ascertained by arbitration, to compensate the plaintiff for damage sustained by him by reason of the loss of a station leased from Her Majesty, by reason of the proclamation of a goldfield, &c. The Governor accordingly directed a reference, and the arbitrators awarded, "that there be paid by the Government to the said T. (the plaintiff), the sum of £4,600 for damages sustained by him." The plaintiff now brought an action of debt upon the award against the Government. *Held*, on demurrer, that the award was *ultra vires*, and that the plaintiff's declaration could not be supported. *Per Manning, J.*, at p. 464:—"No doubt, if the plaintiff had brought an action under the Goldfields Acts, and a reference had been made of all matters in dispute in the action, the direction to pay would have bound the Government." *Troadell v. Driver*, Knox, 459. *Hargrave, Faucett and Manning, JJ.* (1877). N.S.W.

2. — Arbitration — Award by umpire and one arbitrator — 31 Vic. No. 15, sec. 6.] — An appeal from a Mining Court was referred by consent to arbitration, the material portions of the submission being as follows:—"It is agreed that the subject matter of this appeal, and all matters in difference between the parties in any way arising out of the dispute as to the claims of J. and B. be referred to two arbitrators, or to two arbitrators and their umpire, one of the arbitrators to be appointed by each party." "The arbi-

trators, before they proceed on their reference, to appoint an umpire." "The arbitrators, or the arbitrators and their umpire, shall make and publish their award in writing." The award was in the following terms:—"The matter of the above appeal having been referred to arbitration of two arbitrators and an umpire, and the arbitrators having disagreed and referred the matter to the umpire, the umpire makes his award as follows:—I am of opinion that Johnson and party were and are legally in possession of the abandoned mining tenement, known as No. 50 in the Mining Registrar's book at Araluen, and adjoining Burnell's upper section, on the lower boundary, on the Western side of Araluen Creek, J.W.B. I, as one of the arbitrators in the above matter, agree with the award of the umpire, T. de C.B." The other arbitrator refused to join. *Held*, that an award by the majority was a good award. *Johnson v. Blatchford*, 1 N.S.W. S.C.R. (L.), N.S., 277. *Martin, C.J., Hargrave and Manning, JJ.* (1878). N.S.W.

3.—Arbitration—Appointment of umpire—*Ultra vires*.]—A reference to two arbitrators empowered them to call in either of two persons as umpire. One of these being absent from the place where the dispute had to be settled, could not, and the other would not, act. The arbitrators thereupon appointed another person (to whom one of the parties had previously expressed an objection), to act as umpire, and he made an award. *Held*, under 31 Vic. No. 15, sec. 6 (*Arbitrations Facilitation Act*), that such appointment was *ultra vires* and inoperative, and award set aside. *Ex parte Morris, In re Arbitration between A. Morris and the Cargo United Quartz Crushing Co. Ltd.*, 10 N.S.W. S.C.R. (L.), 248. *Stephen, C.J., Hargrave and Faucett, JJ.* (1871). N.S.W.

4.—Arbitration—Arbitrators calling in an accountant—*Ministerial acts*.]—The arbitrators before making their award and after the evidence was closed, called in an accountant to make calculations of cubical contents of a bywash and of certain excavations, on figures given to him by them. *Held*, that his work being simply ministerial and not judicial, the award was not vitiated. *Millthorpe v. The Spa Hydraulic Sluicing and G.M. Co.*, 14 N.S.W. L.R. (L.), 292. *Innes and Stephen, JJ.* (1893). N.S.W.

5.—Arbitration—Company—Declaration un-

der Companies Act, sec. 113—Arbitration Act 1892, secs. 12, 24—Costs.]—If a company is a party in a matter referred to arbitration by the Court under sec. 12 of the *Arbitration Act* 1892, the arbitrator must nevertheless make and subscribe the declaration required by sec. 113 of the *Companies Act*. On an application to set aside the award on the ground that the arbitrator had not made the declaration, the Court, though setting aside the award, refused the applicant costs, as the objection was not taken at the arbitration (*per Stephen, J.*), and also as the point was a difficult one, involving the construction of a new Act of Parliament. *Zelma G.M. Co. Ltd. v. Hoskins*, 14 N.S.W. L.R. (L.), 465. *Innes and Stephen, JJ.* (1893). N.S.W.

6.—Arbitration—55 Vic. No. 32, secs. 12, 24—Companies Act, sec. 113—Declaration of arbitrator—Form of submission of company—Effect of Arbitration Act in arbitrations under other Acts.]—*Held*, on appeal to the Privy Council, overruling the decision of the Supreme Court (14 N.S.W. L.R. [L.], 465), that where an action, one of the parties to which is a company, is referred to arbitration by order of a judge under sec. 12 of the *Arbitration Act* 1892, it is not necessary that the arbitrator should make and subscribe the declaration required by sec. 113 of the *Companies Act*. Sec. 12, sub-sec. (a) of the *Arbitration Act* 1892, is applicable to actions in which one of the parties is a company, and the consent of a company under that sub-section need not be by submission under the company's seal. Sec. 24 of the *Arbitration Act* 1892, has not the effect of introducing into arbitrations under that Act any of the provisions for arbitrations contained in other Acts, such as the *Companies Act*. *Zelma G.M. Co. Ltd. v. Hoskins* (1895), A.C., 100; 64 L.J.P.C., 45; 72 L.T., 32; 11 R., 350; 16 N.S.W. L.R. (L.), 1. *Herschell, L.C., Lords Watson, Hobhouse, Macnaghten and Shand* (1894). N.S.W.

7.—Arbitration—Costs—Taxation.]—*See PRACTICE (COSTS)*.

8.—Arbitration—Award by umpire—Declaration under sec. 113 of Companies Act—37 Vic. No. 19, secs. 112, 113.]—*Vale of Clydd Coal Mining Co. v. City Mutual Fire Insurance Co.* 1 N.S.W. W.N., 69. *Martin, C.J., Faucett and Windeyer, JJ.* (1884). N.S.W.

## AREA

Under mineral license—Miner's right—Mining Act and Regulations.]—See LICENSE.

## ARRANGEMENT

Transfer of shares—Bona fides—Directors—Articles of Association.]—See COMPANY.

## ARTICLES OF ASSOCIATION

See COMPANY; FORMS; FORFEITURE.

## ASSESSMENT

Assessment of compensation—Mining on Private Property Act 1884 (No. 796)—Jurisdiction of Warden to state special case—Leases granted under Act—Right to renewal—Prospective value of land during currency of lease.]—See COMPENSATION; LEASE; PRACTICE.

## ASSESSORS

See ABANDONMENT; PRACTICE.

Assessors.]—Under the Act No. 32, where an issue was left to assessors by the judge, the judge could not disregard the finding of the assessors on the issue. *Brinkman v. Holstein*, 1 W. & W. (L.), 370. Banco (1862). See Act No. 291, sec. 136. V.

## ASSIGNEE

See LEASE.

## ASSIGNEE (OFFICIAL)

See INSOLVENCY; PRACTICE.

Assignee (Official)—Right to sue—Miner's right.]—L. having a miner's right purported to sell his interest in a claim to K., who had not a miner's right, and K. was registered as the owner of the share; subsequently L. became insolvent on the 8th January, 1862. L.'s miner's right expired on the 9th February, 1862; G. became a purchaser from K. in March, 1862, with notice that K. was only a trustee for L. The official assignee brought a suit in the Court of Mines to

have the sale set aside. *Held*, on special case—(1.) That it was not necessary for the official assignee to hold a miner's right to enable him to maintain the suit. (2.) That it was not necessary for the official assignee to show that the alienation was a fraudulent one, under the Insolvent Act. *Goodman v. Kelly*, 1 W. & W. (L.), 332. Banco (1862). V.

## ASSIGNMENT

See PRACTICE.

1.—Transfer of shares—Notice of prior equitable assignment—Bona fide purchaser without notice.]—See COMPANY.

2.—Of scrip.]—See COMPANY.

## ATTACHMENT

See PRACTICE.

Non-compliance with decree.]—Where a decree was made directing a defendant to transfer a mining share to the plaintiff, and deliver up to him the scrip thereof, with transfer duly indorsed, within one month, and such decree was served personally upon the defendant, who failed to comply therewith: *Held*, upon motion for attachment, that a demand should have been made on the defendant to comply with the decree, and motion as sought refused. But order made directing defendant to hand in the scrip, duly indorsed, to the office of the plaintiff's solicitor, at an hour named, and upon affidavit of non-compliance, attachment to issue against him. *Filler v. Stephens*, 6 V.L.R. (E.), 144; 2 A.L.T., 38. *Molesworth, J.* (1880). V.

## ATTESTATION

Attestation of lease under sec. 41 of Goldfields Act 1866 (N.Z.), (30 Vic. No. 32).]—See LEASE.

## ATTORNEY

See CHAMPERTY; PRACTICE; PRIVATE PROPERTY.

1.—Retainer under seal.]—An attorney appearing for a corporation before justices need not produce his retainer under seal. "On the confidence which must exist between a Court and

those practising in it, we are bound to assume that when a professional gentleman says he appears on behalf of certain persons, he is properly authorised." *Per Stawell, C.J. The Queen v. Call, ex parte Gillow*, 6 W.W. & A'B. (L.), 216; N.C., 15 (1869). V.

2.—Mining company—Attorney—Appointment under seal.]—See COMPANY; PRACTICE.

### ATTORNEY-GENERAL

See COMPANY; CROWN LAND; PRIVATE PROPERTY.

1.—Attorney-General.]—The Attorney-General of Victoria is the proper person to enforce the rights of the Crown in the colony. *Attorney-General v. Gee*, 2 W. & W. (E.), 122. *Molesworth, J.* (1863). V.

2.—Not necessary party to suit for trespass by lessee in possession under lease declared forfeited, the Crown having made no re-entry.]—See LEASE; TRESPASS.

3.—Attorney-General—Trespass—Mining Statute 1865, sec. 37—Practice.]—See TRESPASS.

4.—Attorney-General—Name of, surplusage.]—See PRACTICE.

### AURIFEROUS DEPOSIT

See GOLD.

Auriferous deposits—Ownership.]—Auriferous deposits belong to the Crown, subject to the goldfields laws of the colony. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875). N.Z.

### AURIFEROUS EARTH

See GOLD.

1.—Conversion of auriferous earth—Evidence of property.]—See CONVERSION.

2.—Auriferous land—License of.]—See LICENSE.

### AURIFEROUS MATERIAL

See GOLD.

Auriferous sand—Contract—Construction—Measure of damages.]—See CONTRACT.

### AWARD

See ARBITRATION.

### BANK

See MORTGAGE.

### BANKER AND CUSTOMER

Banker and customer—Dishonour of cheque—Jus tertii—Mining Companies Act 1871, secs. 89, 187.]—See COMPANY.

### BANKRUPTCY

See INSOLVENCY.

Bankruptcy—Miner's right—Uncertificated insolvent—Intervention of assignee after Warden's decision—"Re-hearing"—Value of property involved—Practice—Jurisdiction.]—See MINER'S RIGHT. *Bourke v. Lucas*, 3 N.S.W.L.R. (L.), 215 (1882), and see *Bourke v. Wright*, 3 N.S.W.L.R. (L.), 145 (1882).

### BANKS

1.—Banks of stream—Definition by Warden—River claim.]—See CLAIM.

2.—River bank—Right of road.]—See LEASE; ROAD; WATER.

### BATTERY

Battery—Auriferous sand—Contract—Measure of damages.]—See CONTRACT.

### BILL OF EXCHANGE

See COMPANY.

1.—Bill of exchange—Equitable plea—Contemporaneous agreement—Parol evidence.]—In an action on a promissory note made by the defendant in respect of certain shares in a gold mining company, defendant pleaded an equitable plea which set up that the plaintiff agreed to renew: *Held*, that such a plea required a contemporaneous agreement in writing to support it, and there being no such agreement the evidence given at the trial to support the plea was

improperly admitted. *Abrey v. Cruz*, L.R., 5 C.P., 43, followed. *Frazz v. Hayes*, 6 N.S.W. W.N., 110. *Darley, C.J., Stephen and Foster, J.J.* (1889). N.S.W.

2.—Bill of exchange—Equitable plea to action on promissory note—Breach of agreement to renew—Fraud.]—See PRACTICE.

3.—Cheques or orders—Notice of dishonour—Acceptance by secretary of mining company—Companies Act 1864.]—The plaintiff, a store-keeper, was in the habit of receiving from miners in his neighbourhood, in payment for goods, certain documents, signed by the captain and purser of the mine, and addressed to the secretary, and of sending these to his bankers, who at first treated them as cash, but subsequently gave notice to the plaintiff that they would no longer receive them as cash, but only for collection. One batch of these documents was dishonoured, but no notice of dishonour was given by the bank to the plaintiff, and it was not until after a second batch of such documents had been received by the plaintiff and forwarded to the bank, and not until the mine stopped payment, that the plaintiff learned from the defendants that the first batch of documents had been dishonoured. On the trial the above documents were treated by counsel, and on the direction of the Chief Justice, as cheques or orders for payment of money, on which the company was liable, and the verdict of the jury was founded on that direction. *Held*, on appeal, that the documents were bills of exchange, on which—they not having been drawn for and on behalf of the company, nor accepted by the secretary—the company was not liable, and that as this view altered the conditions on which the liability of the defendants depended, there must be a new trial. *Quære*, whether the company would have been liable if the bills had been accepted by the secretary? *Levine v. Bank of Adelaide*, 9 S.A.L.R., 119. *Hanson, C.J., and Gwynne, J.* Common Law (1875). S.A.

## BILL OF SALE

See COMPANY.

1.—No. 409, secs. 47, 48.]—A bill of sale, duly filed and registered, and sealed with the company's seal, is good as against the company under Act No. 409, sec. 48, although it has not

been authorised by an extraordinary meeting. *Campbell v. Hassan*, 5 A.J.R., 135. Banco (1874). V.

2.—Companies Act 1890 (No. 1074), secs. 234, 235—Bill of sale by mining company—Power of company to give.]—The absence of a resolution passed at an extraordinary meeting of the company, in terms of sec. 234 of the *Companies Act* 1890 (No. 1074), does not affect the validity of a bill of sale given by a mining company to secure a past debt. *Price v. Old Quartz G.M. Co.*, 2 A.L.R., 13. *Holroyd, J.* (1896). V.

## BLASTING

Blasting—Church and school lands—Municipal by-laws—Prerogative of Crown.]—See MUNICIPALITIES.

## BLOCK CLAIM

See CLAIM.

## BOILER

Boiler—Fixtures—Mortgage.]—See MORTGAGE.

## BONA FIDES

Bona fides—Transfer of shares—Registration—Arrangement.]—See COMPANY.

## BORROWING MONEY

See COMPANY.

## BOUNDARIES

See BY-LAWS AND REGULATIONS ; PRACTICE.

1.—Boundaries—Marking—Applicant for mineral lease—Entry on Crown lands.]—See LEASE.

2.—Boundaries—Gold mining lease—Land pegged out—Application.]—See LEASE.

3.—Boundary—Waste Lands Acts and Regulations—Pastoral lease—New lease—Public maps.]—See MAP.

## BREACH OF TRUST

Breach of trust — Trust deed — Sale under power—Coal mine.]—See TRUSTS.

## BROKER

See COMPANY, XX.; PRINCIPAL AND AGENT.

## BUILDINGS

1.—Buildings—Mining tenement—Jurisdiction of Warden—Mining Statute 1865, secs. 5, 101, 177, 195.]—See PRACTICE, 409.

2.—Buildings on residence area—Right to remove.]—See RESIDENCE AREA.

3.—Building on land held for mining—Exemption from rates.]—See MUNICIPALITIES.

## BUSINESS LICENSE

See LICENSE.

## BY-LAWS AND REGULATIONS

See CLAIM; FORFEITURE; LEASE; MINER'S RIGHT; RESIDENCE AREA.

1.—Uncertainty—Construction.]—*Semble* that a by-law which gives a claim of an indefinite width, and omits to specify how the boundary lines are to be drawn, is void for uncertainty, and that even if it were not, a complaint for encroachment on a claim held under it, could not be sustained, if a construction could be put upon it which would exclude the land encroached upon from the boundaries of the claim. *Linson v. Walsh*, A.R., 23rd March, 1860. V.

2.—Uncertainty.]—A by-law provided that "the extent of a surfacing claim shall not exceed 60 yards in width by 100 yards back measurement." *Held*, that the Mining Board by this by-law had not fixed the form of the claim, as they had power to do under the Act No. 32, sec. 111, and that the by-law was defective. *Edwards v. Ustice*, A.R., 30th Nov., 1860. V.

3.—Relinquished claims.]—A Sandhurst by-law provided that "it shall be competent for a

Warden to declare any claim relinquished if not worked in a *bond fide* manner." The Act No. 32 enabled the Mining Boards to make by-laws, prescribing the events on which claims "shall become forfeited, or be deemed to be abandoned."

*Held*, that the by-law was sufficiently worded, and was valid. *Perkins v. Sharples*, A.R., 30th March, 1861. V.

4.—Repeal—Existing rights.]—Occupants under a miner's right, of a claim taken possession of under a by-law authorising the occupation of a claim of a certain area, can maintain their occupation of such claim after the passing of a subsequent by-law, which authorises only the occupation of a smaller claim, and which, in addition, annuls and repeals the former by-law, without any saving of existing rights under it. *Raleigh v. Martin*, A.R., 5th April, 1861. V.

5.—Officers of Mining Board.]—A Mining Board had no power under the Act No. 32, sec. 111, to make a by-law prohibiting a mining registrar from holding mining interests. *O'Malley v. Ward*, 1 W. & W. (L.), 279. Banco (1862). V.

6.—Validity of.]—Mining Boards under the Act No. 32, sec. 111, having been appointed for the whole district, could only make by-laws for the whole district; a by-law under that Statute made for a portion of the district only was invalid. *Jenkinson v. Cumming*, 1 W. & W. (L.), 337. Banco (1862). See Act No. 291, sec. 71. V.

7.—Disbursing funds of Mining Board.]—Mining Boards are empowered to disburse funds in a certain way, and they are bound to follow the directions in the Act giving them that power. The mode prescribed is by by-law, and where a Mining Board fixed the salary of a certain officer by a minute, and afterwards wrongfully dismissed him, as no by-law was passed describing the duty of the officer or for his payment: *Held*, that a *mandamus* to the Board to pay all salary due should not go. *Gill v. Nicholas*, 2 W. & W. (L.), 3. Banco (1863). V.

8.—Frontage and block claims.]—Sec. 7 of by-law 13, Ballarat, provided "that claims on alluvial leads of a greater depth than 200 feet shall be worked as frontage claims, and the Registrar shall determine and declare whether they are alluvial leads, and whether the depth is greater than 200 feet." *Held*, that an alluvial

lead of gold found at a greater depth from the surface than 200 feet could be legally claimed by the owners of the block claim, it being assumed that the owner of the block claim was not, when he registered his claim, aware of the existence of the alluvial lead, and that it was not necessary to make a title to such gold by taking possession of such run of gold as a frontage claim. *Critchley v. Graham*, 2 W. & W. (L.), 71. Banco (1863). V.

9.—Construction.]—Rule 5 of the Ballarat Mining District Rules provided that "claims upon all recognised leads or gutters shall be of an indefinite width until such leads or gutters are found." *Held*, that the lead or gutter is found when it is first struck in the successive claims by the claim-owners who search for it there. Rule 8 provided that "in cases where the gutter or lead changes its course from the supposed one, the position of the original claims shall be changed accordingly, taking precedence according to their numbers." *Held*, that claim-owner could not be ejected on the basis that the lead had changed its direction, and that a measurement along its sinuosities would give him more than the length of the lead to which he was entitled. *Thomas v. Kinnear*, 2 W. & W. (L.), 231. Banco (1863). V.

10.—Construction—Abandonment.]—A claim held under the Sandhurst By-laws was left unworked for six months. It was liable to a drainage rate, which had not been paid for the same period. One of the by-laws provided that a claim should be deemed abandoned if unworked for six months. Another provided for forfeiture of claims left unworked for ninety-six consecutive hours. The by-law contained a proviso that a claim should not be liable to be forfeited during any period for which "drainage is being paid." *Held*, that the by-law contemplated real payments habitually made, and not a mere personal liability to pay; and that the Warden could declare the claim abandoned. *Christian v. Kenworthy*, 3 W.W. & A'B. (M.), 11. *Molesworth, J.* (1866). V.

11.—Reasonableness—Taking possession—Breach.]—A by-law of the Beechworth district provided that claims should be taken possession of by erecting posts of certain dimensions at each corner of the claim. Where a miner had taken possession of a claim by erecting two posts at one boundary, blazing a tree at another, and

adopting a stump as a post at another, it was held that the by-law was reasonable, that the non-compliance with it avoided the effect of taking possession, and was not merely punishable by fine as a breach of by-law. *Thomson v. Land*, 3 W.W. & A'B. (M.), 13. *Molesworth J.* (1866). V.

12.—Exemption from work.]—The Sandhurst by-laws prescribed a means for obtaining a certificate of exemption from work for a time named in the certificate. They also provided for the revocation of the certificate by the Warden, where it had been obtained by false pretences. Where it was admitted that the certificate had been obtained on false pretences: *Held*, that the certificate was not void *ab initio*. *Buller v. O'Keefe*, 3 W.W. & A'B. (M.), 16. *Molesworth, J.* (1866). V.

13.—Boundaries of claims.]—A local Court rule was as follows:—"The width of claim from east to west shall be 200 feet—100 feet on each side of the working shaft on the line of reef; and the holders of quartz claims shall be entitled to the dips and angles of all reefs found within the reef, and may follow the same to whatever distance they may dip east or west." *Held*, that this rule was neither *ultra vires* nor void for uncertainty. *Vivian v. Dennis*, 3 W.W. & A'B. (M.), 29. *Molesworth, J.* (1866). V.

Sec. 73 of the Act No. 291 has a retrospective operation. *Ibid*. V.

14.—Negating exceptions—Abandonment.]—Where a by-law provided for the abandonment of claims for non-working with various exceptions: *Held*, that it was not necessary for a party seeking to enforce the abandonment or forfeiture to negative those exceptions which rested upon facts lying peculiarly within the defendant's knowledge. *Longbottom v. White*, 3 W.W. & A'B. (M.), 35. *Molesworth, J.* (1866). V.

15.—Persons to enforce—Preservation of by-laws.]—The Act No. 291, sec. 2, shows an intention to preserve by-laws apart from the 80th section; and sec. 71 (x.), does not make it necessary for the efficiency of a by-law as to abandonment that it should point out a person to adjudicate. The board may leave that duty to the ordinary officer, viz., the Warden. *Longbottom v. White*, 3 W.W. & A'B. (M.), 35. *Molesworth, J.* (1866). See Act No. 291, sec. 73. V.



**16.—Boundaries of claims.]**—A by-law providing that the lateral boundaries of a claim should not be defined until the lead or gutter in such claim should be struck was held not to be *ultra vires* as giving claims with vague and indefinite limits. The Act No. 111 expressly legalised the system; and the Act No. 291, sec. 73, has the same effect. *United Extended Band of Hope Co. Regd. v. Tennant*, 3 W.W. & A'B. (M.), 41. *Molesworth, J.* (1866). V.

**17.—Construction.]**—It is a general principle in the construction of Statutes, applicable also to by-laws, that where a right is given, and by the same section a remedy for its enforcement, the right shall be enforced only by the remedy given. *Hunter v. Aratraveld*, 3 W.W. & A'B. (M.), 62. *Molesworth, J.* (1866). V.

**18.—Boundaries of claims.]**—A local Court regulation provided that the width of a claim should be 100 feet on each side of the line of the reef, and that the holders should be entitled to the dips and angles of all reefs found within the boundary, and might follow the same to whatever distance they might dip. Held, that the owners of a claim were entitled to hold spaces between the reef and a line running parallel to its actual course, straight or curved, and also entitled to follow the dips and angles of the reef connected with it though beyond 100 feet. *Müller v. Fraser*, 4 W.W. & A'B. (M.), 29. *Molesworth, J.* (1867). V.

**19.—Retrospective.]**—By-laws cannot be retrospective in their operation. *Bond v. Watson*, 4 W.W. & A'B. (M.), 87. *Molesworth, J.* (1867). V.

**20.—Competent Court to enforce penalty.]**—A Police Magistrate, being also a Warden, sitting in a Police Court, can hear and determine a complaint for the recovery of penalty for breach of by-law under Act No. 291, sec. 237. *The Queen v. Pohlman, ex parte Nickless*, 5 W.W. & A'B. (L.), 31. Banco (1868). V.

**21.—Partnership.]**—P. was a sleeping partner with M. in a block claim, and M. worked it for himself and P. on certain terms as to the division of the profits. M. while working the claim discovered another reef, and took up a claim on it for himself under a regulation which provided "that any party working in a claim shall be entitled to an area of ground, provided such

paying reef be not within 40 feet of the edge of the gutter." Held, that P. had no interest in the new claim, as it was intended to be the reward of labour; and that the new claim had nothing to do with the partnership subsisting in the other claim. *Perry v. Morton*, A.R., 26th Nov., 1868. V.

**22.—Taking possession.]**—P. and party on the 26 September, 1867, purported in pursuance of the Beesworth by-laws, to take up four adjoining claims by erecting four posts only, one at each angle of the land taken up. On the 28th, P. and party registered the four claims separately, and immediately afterwards registered them as one amalgamated claim. On the 26th September, some hours after the marking out by P. and party, H. and party marked off the same ground as four separate claims, and registered them on the 28th September. Held, that the Warden was right in deciding that P. and party should have in the first instance marked off each of the single claims separately, and that P. and party, intending on the 26th to take up distinct claims, had not marked them distinctly, and had not therefore priority over the complainants, who had marked properly on that day. *Holt v. Pratt*, A.R., 2nd Dec., 1868. V.

**23.—Ballarat By-laws—Meaning of "holder" of claim—Protective registration.]**—The Ballarat By-law No. 8 provided that the holder of a claim might obtain protective registration on certain conditions. Held, that the word "holder" meant registered holder, and that persons not registered could not avail themselves of the by-law. *Thompson v. Begg*, 2 A.J.R., 34. *Molesworth, J.* (1871). V.

**24.—Under Act No. 32—Act No. 291, secs. 73, 80—Invalid by-law—Quashing Warden's order in part.]**—A by-law under the Act No. 32, required a person who successfully applied for forfeited ground, to pay before obtaining possession of the ground such compensation to the former owner as the Warden should determine. A Warden declared a forfeiture, but directed the complainant to pay £555. On the motion to quash the order in part, so much of the Warden's order as directed payment was quashed, on the ground that the by-law providing for such payment was *ultra vires*, under the Act No. 32. *The Queen v. Cogdon, ex parte Hartmann*, 3 A.J.R., 118, Banco (1872). See *Jacomb v. Sayers*,

3 A.J.R., 66, Banco (1872). See *Reardon v. Sayers*, 3 A.J.R., 126. *Moleworth, J.* (1872). V.

25.—Validity of by-laws—Act No. 32—Act No. 291, sec. 80—Sandhurst By-law No. 6, sec. 2—Registration under Warden's order—Orders good in part and bad in part.]—J., M. and R., on the 16th January, 1865, took up a claim under Sandhurst By-law No. 6. In 1872 H. applied to the Warden to be put in possession on the ground of forfeiture. The Warden declared the ground forfeited, and directed possession to be given to H. on payment of £555 15s., value of defendants' material then on the ground. H. took possession but did not pay the money. H. subsequently transferred the claim to S. B. then applied to the Warden to be put in possession of the claim as against J., M. and R.—a friendly suit, B. acting in the interests of J., M. and R. The Warden made an order in favour of B., who took possession and transferred to J., M. and R., against whom S. then brought an action for trespass. On special case stated by the parties for the opinion of the Supreme Court two questions were asked:—(1.) Could H. lawfully take possession without paying the money? (2) Was S. entitled to the claim as against the defendants, J., M. and R.? *Held* (1.) That both questions should be answered in the negative. (2.) That Sandhurst By-law No. 6, sec. 2, directing value to be paid by defendants before obtaining possession of forfeited ground, was *ultra vires* under the Act No. 32, under which Act it was framed, and that the *Mining Statute* (No. 291), sec. 80, did not make such by-law valid. (3.) That when a Warden declares ground forfeited and orders possession to be given to the complainant, the complainant is right in having himself registered for the ground as ground taken up by him under his miner's right. "The Warden's order only decides that the land is open for selection. It declares that the ground has been forfeited by defendants; it removes existing rights such as they were, and then the plaintiff afterwards takes it up by virtue of his miner's right. If he had no miner's right he could not occupy it."—*Per Stawell, C.J.* (4.) That it was not competent for H. to take possession of the ground under the order, without paying the money, so long as that part of the order requiring the money to be paid was not quashed by the Court. *Sayers v. Jacomb*, 3 A.J.R., 65 and 66. Banco (1872). V.

26.—Regulations—Mining Statute 1865, sec. 43—*Ultra vires*.]—Regulations 44 to 47 of Orders-in-Council of 23rd January, 1871, made under sec. 43 of the *Mining Statute* 1865 (No. 291), are not *ultra vires*. *Robertson v. Morris*, 7 V.L.R. (M.), 1; 2 A.L.T., 109. *Moleworth*, Chief Judge (1881). And see LEASE. V.

27.—Mining Statute 1865 (No. 291), secs. 71, 72, 73—Mining by-laws—*Ultra vires*.]—Sec. 72 of the *Mining Statute* 1865 (No. 291), prevents the Court of Mines from entertaining any question whether a duly certified and published mining by-law is *ultra vires* under sec. 71; such a question must be decided in the mode prescribed by sec. 73. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33. *Webb, J.* (1887). V.

28.—By-law—Claim—Warden's order for possession—Marking out—Registration—Title to mining claim—Ballarat Mining By-law III., secs. 14, 15, 16, 28.]—See CLAIM.

29.—Mines Act 1890 (No. 1120), sec. 106, subsec. 7—Power of making by-laws under—Forfeiture.]—See FORFEITURE.

30.—Regulations, September, 1869, Nos. 7, 14—Goldfields Act of 1866—Pegging out—Amalgamation of claims.]—See CLAIM.

31.—Regulations, 14th February, 1870—Goldfields Act of 1866 (repealed)—Lease—Forfeiture—Crown.]—See FORFEITURE.

32.—Regulations—Goldfields Act of 1866, secs. 5, 14—Goldfield not proclaimed—Miner's right—Justices.]—See GOLDFIELD.

33.—Regulations—Mining Act of 1874—December, 1875, Nos. 105, 106, 124—Married woman—Share in mining claim—Separate use.]—See HUSBAND AND WIFE.

34.—Regulations—Mining Act 1874—Regulation 95 of December 29th, 1875—*Ultra vires*.]—See MINING ACT.

35.—Regulations—Gold Mining Regulations, 21st March, 1872 and 29th December, 1875—Registration—Quartz prospecting claim—Labour conditions.]—See CLAIM.

36.—Regulations—Mineral lease—No. 5—Marking boundaries of lease on Crown land—Sending in application.]—See LEASE.

37.—Regulations—Mineral leases—Nos. 28, 34,

35, 48.—Applicant failing to execute leases—Cancellation.]—See LEASE.

38.—Regulations—Mining Act—No. 27—Mining lease—License—Trespass.]—See LICENSE.

39.—Regulation—Coal Mines Regulation Act (39 Vic. No. 31), sec. 20—Check-weigher.]—See COAL MINE.

40.—Regulations—Gold mining lease—Nos. 28, 33—Quartz claim—Miner's right—Mining Act 1874.]—See LEASE.

41.—Regulations—Mineral license—Regulations 4, 5, 28—Mining Act (37 Vic. No. 13)—Holding more than one license.]—See LICENSE.

42.—By-laws—Municipalities—Church and school lands—Blasting—Prerogative of the Crown.]—See MUNICIPALITIES.

43.—Regulations—Mineral Lease Regulations of 1885—No. 2—Marking out—46 Vic. No. 7, sec. 1.]—See LEASE.

44.—Regulations—Quartz claim—Taking up more than one—Effect of registration.]—See MINER'S RIGHT.

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## CAGE

See MACHINERY.

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## CALLS

See COMPANY, III.

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## CANCELLATION

See CLAIM; LEASE; WATER.

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## CAPITAL

See COMPANY.

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## CASE

See PRACTICE (APPEAL), 40, 42, 43, 88.

## CERTIFICATE

See COMPANY; PRACTICE.

1.—Forfeiture of claim—Suspension certificate.]—A certificate obtained under a by-law allowing a suspension for a certain period of the requirements of by-laws as to the employment of labour, does not amount to a constructive working so as to redeem a title forfeited by a previous non-fulfilment of such requirements. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33. *Webb, J.* (1887). V.

2.—Forfeiture of claim—Suspension certificate.]—Under a by-law allowing a suspension of labour conditions, on the ground (among others) of "breakage of machinery, or any other sufficient cause, to be settled by the Warden," no protection is afforded by a suspension certificate granted on a statutory declaration stating the ground as "want of machinery to crush, &c.," the evidence showing that the ground referred to the stoppage of a public crushing machine at which the claim-holder usually had his stone crushed. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33. *Webb, J.* (1887). V.

3.—Certificate of registration—Priority.]—Mere priority in point of number of a certificate of registration, issued by a Warden, is not a priority in point of right. *Ah Mon v. Bradfield*, 1 N.Z.J.R. (N.S.) M.L., 44. N.Z.

4.—"Certificate"—"License."]—"Certificate" and "license" are used in the various N.Z. Goldfields Acts and Regulations as convertible terms. *Reg. v. Keddell*, N.Z.L.R., 1 S.C., 185. *Williams, J.* (1882). N.Z.

5.—Company—Certificate of incorporation—Essentials to registration.]—See COMPANY, 124.

6.—Failure to renew certificate of registration—Forfeiture.]—See CLAIM; FORFEITURE.

7.—Prospecting claim—Cancellation of certificate—"Prescribed conditions."]—See CLAIM.

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## CERTIFICATE OF TITLE

See LEASE; MINER'S RIGHT.

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## CERTIORARI

See PRACTICE (CERTIORARI).

## CHAIRMAN

**Chairman—Court of Appeal—Qualification—Miner's right—25 Vic. No. 4, sec. 30.]—See PRACTICE, 80, 81.**

## CHAMPERTY

1.—**Champerty.]—**A plaintiff, seeking to be put in possession of ground, stated in his evidence that he had arranged with the clerk of his attorney to give him 6-7ths of the claim, if recovered, as security for costs of the suit, if successful, and limiting these costs to £20. The Judge of the Court of Mines being of opinion that the suit was carried on principally on behalf of the clerk, offered to make this clerk a party, and the offer not being accepted dismissed the plaint with costs. *Semble*, that there is no general objection to a plaintiff suing without making a party, a person for whom he is to be trustee, and that the facts might afford a ground for its dismissal, as being based on a champertous bargain, rather than for amending it as to parties. *Rond v. Watson*, 4 W.W. & A'B. (M.), 87. *Molesworth, J.* (1867). V.

2.—**Champerty.]—**Where an attorney induced certain persons to apply to be put in possession of a mining claim, occupied by others, and bought miners' rights for them, in order to enable them to institute proceedings, and bargained with them for a share of the claim if successful: *Held*, that the proceedings instituted in consequence of this arrangement were in their inception and concoction based upon champerty and maintenance; and that the Judge of the Court of Mines was right in dismissing the suit. *Held*, further, that in order to constitute champerty there need not be a binding contract, as between the parties; there need not be such a contract as apart from its illegality would be valid and binding. *Collins v. Hayes*, 6 W.W. & A'B. (M.), 5. *Molesworth, J.* (1869). See 5, *infra*. V.

3.—**Furnishing funds to carry on suit.]—**Where it appeared that a person furnished funds to another to enable him to carry on a suit for enforcing the forfeiture of a claim, in which he was to have an interest if the forfeiture should be decreed: *Held*, that this presented the objection of champerty or maintenance. "The plaintiff has no right except one which can be

acquired by litigation, and the inception of that litigation was through a bargain contrary to public policy—I should not, I think, follow the same course as to several persons avowedly joining in such a suit at common charges, common risk for common benefit."—*Per Molesworth*, Chief Judge. *Mitten v. Spargo*, 1 V.R. (M.), 22; 1 A.J.R., 70. *Molesworth, J.* (1870). See 5, *infra*. V.

4.—**Persons interested in similar disputes—Agreement to bear part of expenses—Maintenance.]—**W., whose shares in a mining company, registered, had been forfeited by the directors, instituted a suit in equity to have the forfeiture set aside. Some other shareholders, whose shares had been forfeited at the same time and under similar circumstances, agreed with W. to bear part of the expenses of the suit in order to test the question. *Held*, that this was neither champerty nor maintenance. *Wood v. Freehold United G.M. Co.*, 1 A.J.R., 173. *Molesworth, J.* (1870). V.

5.—**Champerty—Proceedings for forfeiture of claim.]—**If a proceeding to obtain an adjudication of forfeiture of a mining claim be in fact taken at the joint expense, and for the joint benefit of the complainant and some other person, the proceedings will be bad on the ground of champerty, and this objection will form a good ground of defence. *Mitten v. Spargo*, 1 V.R. (M.), 22, and *Collins v. Hayes*, 6 W.W. & A'B. (M.), 5, followed. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33. *Webb, J.* (1887). V.

6.—**Champerty—Definition of.]—**Champerty implies a bargain of some sort between the plaintiff or defendant in a cause and another person who has no interest in the subject in dispute, to divide the property sued for between them if they prevail, in consideration of that other person carrying on the action at his own expense. The above rule does not apply when the person maintaining the action has an interest in the thing at variance. *Hayes v. Levinson*, 16 V.L.R., 305; 11 A.L.T., 180. *Hood, J.* (1890). V.

7.—**Champerty.]—**In order to support a defence founded upon champerty, it must be shown that the right which the plaintiff is seeking to enforce is founded upon an agreement for maintenance or champerty, no matter with whom made. *Hayes v. Levinson*, 16 V.L.R., 305, fol-

lowed. *Carpenter v. Boyce*, 18 A.L.T., 91; 2 A.L.R., 239. *Hood, J.* (1896). V.

8.—Collateral champertous agreement.]—Where the plaintiff has a perfectly legal right, independently of any unlawful bargain, it cannot be defeated by proof of a collateral champertous agreement. *Carpenter v. Boyce*, 18 A.L.T., 91; 2 A.L.R., 239. *Hood, J.* (1896). V.

## CHARGING ORDER

Charging order—Cannot be made on shares forfeited for non-payment of call.]—See COMPANY, 212.

## CHATELS

Chattels—Interests in land taken up under Mining Act 1874 (N.S.W.)—Statute of Frauds.]—See CONTRACT.

## CHEQUE

1.—Cheque—Dishonour—Jus tertii—Mining Companies Act 1871 (V.), secs. 89, 187.]—See COMPANY, 355.

2.—Cheque—Or order—Notice of dishonour.]—See BILLS OF EXCHANGE.

## CHIEF JUDGE

See PRACTICE.

## CHINESE

Chinese—Miner's right.]—See ALIEN; MINER'S RIGHT.

## CLAIM

See ABANDONMENT; BY-LAWS AND REGULATIONS; HUSBAND AND WIFE; LEASE; MUNICIPALITIES; ROAD.

1.—Lease not a claim.]—Land held under lease from the Crown is not a claim. *Re Clow, ex parte Hewitt*, 2 W. & W. (L.), 160. Banco (1863). See Act No. 291, sec. 3. V.

2.—Land temporarily reserved.]—A temporary reservation or application of ground for public purposes preserved the ground from

being taken up as a "claim" under sec. 3, 21 Vic. No. 32. *United Sir William Don G.M. Co. Regd. v. Kohinoor G.M. Co. Ltd.*, 3 W.W. & A'B. (M.), 63. *Molesworth, J.* (1866). V.

3.—Criminal Law and Practice Statute 1864, sec. 107—Claim—Lease from the Crown—Keeping back gold with intent to defraud—Conviction.]—The word "claim" in sec. 107 of the *Criminal Law and Practice Statute* (No. 333), does not include land held under lease. D. was informed against under sec. 107 for keeping back gold found in a claim with intent to defraud his co-adventurers. The evidence showed that the gold was found in land held under lease from the Crown. D. was found guilty, but on a case reserved the conviction was quashed. *Reg. v. Davies*, 2 A.J.R., 74. Banco (1871). V.

4.—Frontage claim—Ballarat By-laws 3, 10, 12—Extent of ownership.]—Under the Ballarat By-laws (3, 10, 12), a frontage claim subsists over its entire surface, until narrowed under the by-laws; and the right of a frontage claim-holder under these by-laws is not to the gold in the gutter only, but to all auriferous earth at any depth within his claim as narrowed. *St. George and Band of Hope United Co. v. Band and Albion Consols Co.*, 2 A.J.R., 82. *Molesworth, J.* (1871). V.

5.—Proclamation of road—Effect on title to claim.]—The proclamation by the Government of a road through a claim will not override the title of the claim-holders. *Mayor, &c., of Eaglehawk v. Waddington*, 5 W.W. & A'B. (M.), 6. *Molesworth, J.* (1868). See Act No. 291, secs. 13, 18. V.

6.—Taking up claim—Warden's order—Power of attorney—Injunction—Registration—Priority.]—W. took up a claim in the Ballarat district, but did not work it in accordance with by-laws, and so rendered it forfeitable. J. instituted proceedings for forfeiture before the Warden against W. D. on the 25th November, marked out the ground, took possession, and on the 26th applied for registration. J., on the same day—the 26th—obtained an order of forfeiture against W., and applied for registration. J. proceeded to take possession, but D. brought an action of trespass against him before the Warden, who decided that J. was a trespasser and decreed a perpetual injunction against the Registrar, restraining him from registering J. J. appealed to the Court of Mines. On special case to Chief

Judge: *Held*, (1.) The proper office of special cases is to state facts and ask the opinion of the Chief Judge as to the law only; not to substitute the Chief Judge for a Judge or Warden, to decide facts upon a balance of evidence. (2.) If W. had actually abandoned, D. was warranted in marking out the claim. (3.) In any case D. was warranted in taking possession on the 25th November as against J.; J.'s proceedings rendering secs. 20 and 21 of the by-law unavailing to him—(*See Truswell v. Powning*, 1 V.R., M. 13). (4.) A person not having a miner's right may give a power of attorney to take up ground, in anticipation of having it, as well as persons anticipating the acquisition of property. *Quare*, whether a Registrar is subject to any injunction. *Keast v. D'Angri*, 4 A.J.R., 61. *Molesworth, J.* (1873). V.

7.—Crown land—Residence area—Surface—Damages—Trespass—Act No. 291, secs. 5, 13—Act No. 32, secs. 3, 4.]—Under the *Mining Statute* 1865 (No. 291), the sub-soil of Crown land applied to any public purpose, or held under a miner's right, or business, or other license (as contradistinguished from a lease), may be within the limits of a claim, and unless excepted by the Governor-in-Council, be mined upon with impunity so long as the surface rights are not injured. Therefore a claim may include a residence area. Trespassers not in possession under any colour of title, and not under any mistake as to facts, although misapprehending the law, are not entitled to deduct expenses of obtaining gold, within the principle recognised in *Munro v. Sutherland*, 5 A.J.R., 75. *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.), 218. Banco (1876). V.

8.—Marking out—Taking possession—Constructive possession—Shifting pegs—By-law.]—A by-law provided that "all claims shall be marked out at the time of taking possession thereof, by substantial pegs erected at each angle of the claim." W. marked out a claim in accordance with the by-law when he had not a miner's right. When he obtained one he shifted his two southern pegs, decreasing the quantity of ground. *Held*, by the Chief Judge, that the ground was not legally marked out, inasmuch as when he obtained his miner's right he did not fix four pegs, but only retained two, and altered the other two. *Held* also, that such alteration of his boundary was not a constructive taking

possession of a claim under his miner's right. *Barrington v. Willox*, 4 V.L.R. (M.), 2. *Molesworth, J.* (1878). V.

9.—Pegs—Highway—Amalgamation—Revivor—Illegality.]—If by-laws require pegs to be fixed at the corners of a claim, and two of such corners are on a highway, the fixing of pegs on the highway, though an illegal act for which those who place them there may be otherwise responsible, will be effectual as regards the taking up of the claim. If an amalgamation be irregular, the owners of the amalgamated claim are thrown back on their original titles, and the rights under the separate claims prior to amalgamation are revived. *Parade G.M. Co. v. Victoria U. Co.*, 3 V.L.R. (E.), 29. *Molesworth, J.* (1877). V.

10.—Possession—Registration—Lease—Application—Evidence—Mistake—By-law.]—Taking possession by pegging out a claim, is good as against a person subsequently marking out as for a lease, although the marking out for lease is prior to registration of claim. In an application for registration of a claim, a mistake as to time of taking possession may be explained by evidence of the real facts. Such mistakes cannot be taken advantage of by applicants for lease. *Quare*, as to effect of such mistake as between holders of miners' rights under by-laws. *Greenhill v. Braidley*, 4 V.L.R. (M.), 8. *Molesworth, J.* (1878). V.

11.—Claim—Warden's order for possession—Marking out—Registration—Title to mining claim—Ballarat Mining By-law III., secs. 14, 15, 16, 28.]—Generally a Warden's order for possession only clears away former titles; and the party obtaining it should proceed to mark out and register as upon taking up a new claim. But where a by-law provided for marking out and registration of claims generally, necessitating delays; and a subsequent clause of the same by-law provided that a person obtaining an order for possession should produce it before the Registrar, who should register *forthwith* such person for the claim, in lieu of the person who should have forfeited the claim; marking out and registration under the former part of the by-law was held unnecessary. *Barton v. Band of Hope and Albion Consols*, 6 V.L.R. (M.), 1; 1 A.L.T., 145. *Molesworth, J.* (1890). V.

12.—Claim—Title to—Block claim—Frontage

**claim—Inconsistent titles.]—**A right based upon possession is to be limited to one title. Where a claim-holder, afraid of an adverse title, takes an assignment of it, and becomes registered as assignee, he loses the protection of his previous title. *Barton v. Band of Hope and Albion Consols*, 6 V.L.R. (M.), 1; 1 A.L.T., 145. *Molesworth, J.* (1880). V.

**13.—Claim—Plaint for trespass and damages—Assignment by complainant pending appeal.]—**Where, between the hearing of a complaint before the Warden for trespass to a mining claim and damages, and the hearing of an appeal to the Court of Mines from his order dismissing the plaint, the complainants had assigned their rights, and the assignees had been registered: *Held*, that the appellants did not thereby lose their right of appeal. *Herbert v. Millan*, 6 V.L.R. (M.), 13; 1 A.L.T., 202. *Molesworth, J.* (1880). V.

**14.—Amalgamated claims—Registration—Trespass.]—**Where a complainant was registered for two claims which had been amalgamated, but the amalgamated claim had not been separately registered, and trespass was proved on the amalgamated claim, but there was nothing to show on which of the two original claims the trespass was committed: *Held*, that the complainant could not succeed. *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.), 19. *Molesworth, J.* (1882). V.

**15.—Mining Statute 1865 (No. 291), secs. 7, 8—Ballarat By-law XI.—Transfer of claims—Transferee holding one miner's right.]—**Under Ballarat By-law XI, one man holding one miner's right may be transferee of a claim not exceeding fifty men's ground. *Lang v. Costin* (unreported), 24th Sept., 1878, *Molesworth, J.*, followed. *Baker v. Wong Pang*, 8 V.L.R. (M.), 28; 4 A.L.T., 28. *Molesworth, J.* (1882). V.

**16.—Mining claim—Marking out frontage claim—Private property—Castlemaine By-laws III., sec. 10.]—**If the surveyor is unable to mark out a claim without going on private property, no title can be acquired in the claim. *Talent v. Dibdin*, 8 V.L.R. (M.), 31. *Molesworth, J.* (1882). V.

**17.—Marking out claim—Gazette notice of forfeiture of lease.]—**Marking out a gold mining claim on the evening of the day on which the *Gazette* notice of forfeiture of a gold mining lease

of the land marked out is published, is a good marking out. *Weddell v. Howse*, 8 V.L.R. (M.), 44; 4 A.L.T., 95. *Molesworth, J.* (1882). V.

**18.—Claim—Marking out—Boundary posts.]—***Semle, per Higinbotham, J.*—An objection as to a claim not being properly marked out to the effect that a certain size and number of posts have not been erected as required by the by-laws is not a mere formal or technical objection, but is a matter of substance. *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.), 70, at p. 83; 3 A.L.T., 68 (1882). V.

**19.—Mining Statute Amending Act 1872 (No. 446), secs. 3, 4—Marking out claim pending application for lease.]—**Where land had been marked out for a lease by A., whose application was subsequently refused, and pending the application B. marked it out for a claim: *Held*, that a stranger to A. could take advantage of this irregularity on the part of B. under secs. 3 and 4 of the *Mining Statute Amendment Act 1872* (No. 446). *Weddell v. Howse*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1883). V.

**20.—Mining Statute 1865 (No. 291), sec. 7—Amalgamated quartz claim—Width.]—**A mining by-law provided that the width of a registered quartz claim should not exceed 750 feet, also that adjoining quartz claims might be amalgamated and re-registered as one claim. *Held*, that adjoining quartz claims might be amalgamated and re-registered, though the amalgamated claim exceeded 750 feet in width. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54. *Molesworth, J.* (1883). V.

**21.—Amalgamated quartz claim—Application to re-register.]—**A verbal application to re-register an amalgamated claim, made by the manager of a company, with the consent of others interested, is valid. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54. *Molesworth, J.* (1883). V.

**22.—Re-registration of amalgamated claim—Prior titles.]—**Where an amalgamated claim has been re-registered under Ballarat By-law No. XI. [*See Government Gazette*, 31st October, 1873, p. 1900], the previous separate titles to the claim amalgamated cannot be relied upon. *Parade Co. v. Victoria United Co.*, 3 V.L.R. (E.), 24, questioned. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54. *Molesworth, J.* (1883). V.



**23.—Manager of mining company—Registered holder of mining claim—Power to deal with it.]**—The registered holder of a mining claim, although only a trustee for others, can, without the authority of his *cestuis-que-trustent*, give a valid consent to a portion of such claim being included in a mining lease; and the consent of the beneficiaries is not necessary. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 37. F.C., *Stawell, C.J.*, *Higinbotham and Williams, JJ.*, affirming *Molesworth, J.* (1883). V.

**24.—Mining Statute 1865 (No. 291), secs. 6, 24 — Manager of mining company — Registered holder of mining tenement—Power to deal with it—Conflict between claim-holder and lessee.]**—S., the manager of the plaintiff mining company, was the registered holder of a mining tenement as trustee for the company, and upon conflicting applications by himself and A., the manager of the defendant company, for leases of adjoining lands for their respective companies, consented that a portion of the land comprised in the mining tenement should be given up and included in the lease to be issued to the defendant company. *Held*, upon appeal (affirming the decision of *Molesworth, J.*), that S., as registered holder of the claim, had power to consent to give it up; but that if the authority of the plaintiff company was necessary, the facts showed such authority. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 37. F.C., *Stawell, C.J.*, *Higinbotham and Williams, JJ.* (1883). V.

**25.—Mining Statute 1865 (No. 291), secs. 16, 37 — Leasing Regulations, 27th January, 1871, Clause 4 (d)—Mining claim under public street—Permit to mine—Application for mining lease —Notice—Person in occupation.]**—The holder of a miner's right who marks out a portion of a street as a claim, and then applies to the body having its management for a permit to mine under sec. 16 of the *Mining Statute 1865* (No. 291), is a person in lawful occupation of the land, and, as such, is entitled under the Leasing Regulations of 27th January, 1871, Clause 4, sub-sec. (d), to notice of an application by a person, who, after the permit is applied for but before it is granted, marks out the land and applies for a mining lease. *Holmes v. Reynolds*, 11 V.L.R., 711. *Molesworth, J.* (1885). V.

**26.—Mines Act 1890 (No. 1120), secs. 10, 135, 216—Abandonment of claim—By-laws—Miner's right.]**—A claim which has not been abandoned in accordance with the by-laws of the mining district, cannot be taken up and registered by the holder of a miner's right. *Carpenter v. Boyce*, 18 A.L.T., 91; 2 A.L.R., 239. *Hood, J.* (1896). V.

**27. — Claim—Pegging out—Agent — Regulations—Amalgamation of claims—Partnership—Goldfields Act of 1866 (repealed).]**—No. 7 of the Regulations of 24th September, 1869, made in pursuance of the *Goldfields Act* of 1866 (30 Vic. No. 8), provided that "the mode of taking possession of a claim shall be by defining the boundaries thereof by sinking substantial pegs at each corner of such claim." *Held*—(1.) That possession of a claim must be taken, and the boundaries defined personally by the intending owners; it cannot be done by an agent. (2.) That the amalgamation of several claims, under Regulation No. 14, does not constitute a partnership in respect of such claims; it only enables separate owners to work together and mingle their produce. (3.) That a miner must be the holder or possessor of a claim before he can amalgamate it with claims of others. (4.) And, for the above reasons, that one member of an amalgamated claim cannot act for the rest in pegging out such claim. *Ex parte M'Innes*, 9 N.S.W.S.C.R. (L.), 28. *Stephen, C.J.*, *Hargrave and Cheeke, JJ.* (1870). N.S.W.

**28.—Quartz-prospecting claim — Gold Mining Regulations, 21st March, 1872, and 29th December, 1875—Registration.]**—Where a person has taken up a quartz-prospecting area, and has left it unoccupied for two years, his title to such land lapses absolutely; and after such forfeiture any other person may become the registered holder of the land. Such registration when adjudicated upon is final between the parties. *Per curiam*, at p. 385:—"If the claim in question were an alluvial claim, it is clear that it would not become forfeited by reason of not putting upon it the labour required in other cases by the regulations." "If the holder of a quartz claim mine in such claim for alluvial gold only, he is not to be freed from the labour conditions." *Mongan v. Readford*, 5 N.S.W.L.R. (L.), 393; 1 W.N., 86. *Martin, C.J.*, *Windeyer and Innes, JJ.* (1884). N.S.W.



**29.—Reward claim—Measurement of distance**—*Goldfields Act 1874* (38 Vic. No. 11), Regulation 44.]—Regulation 44 made under the *Goldfields Act 1874* (38 Vic. No. 11), provides:—"The reward claim which shall be given for the discovery of gold in apparently payable quantities on any new reef, or the re-discovery of the same on any reef previously occupied and abandoned, shall be in proportion to the distance from any reef being worked, and as follows:—If distance less than 400 yards, 100 feet along the line of reef [other proportional distances here follow]. With a width of 400 feet. The above reward shall be in addition to the number of claims the party would be otherwise entitled to as ordinary miners, in ordinary quartz claims." *Held*, that the measurement of distance referred to is horizontal plane measurement. *Sievers v. McAuly*, 1 Q.L.J., App., 54. F.C., *Lilley, C.J., Lutwyche and Harding, JJ.* (1879). Q.

**30.—Reward claim—Goldfields Act 1874** (38 Vic. No. 11), Regulations 6, 9.]—Regulations 6 and 9 made under the *Goldfields Act 1874*, provide:—"6. Any party of miners may take possession of a claim (except where otherwise specially provided), by fixing firmly in the ground at each corner of the claim, a peg or post, projecting at least two feet above the surface, and set in L trenches three feet long and six inches deep along each boundary line, provided that no other miner or miners is or are then in possession or occupation thereof. In the event of any other miner or miners being in possession of the claim the party desiring to take possession shall apply to the Warden to inquire into the matter, and in case any miner shall take forcible possession of, or commence to work in any claim after his right to take possession thereof has been disputed, he shall forfeit all right and title which he may have acquired therein. 9. Any miner marking off more ground than he is entitled to shall be liable to have the surplus ground pegged off at either end of the claim at the option of any other miner." *Semble*, these regulations do not apply to reward claims, but only to holders of ordinary claims marked off by themselves. *Sievers v. McAuly*, 1 Q.L.J., App., 54. F.C., *Lilley, C.J., Lutwyche and Harding, JJ.* (1879). Q.

**31.—Goldfields Act 1874** (38 Vic. No. 11)—Regulation 54—"Ordinary quartz claim."—Under Regulation 54 of the Regulations made in pur-

suance of the *Goldfields Act 1874* (Q.), (38 Vic. No. 11), one man can only take up as an ordinary quartz claim, 50 feet along an ordinary line of reef by 400 feet. *Queen v. Cribb*, 2 Q.L.J., 157. *Harding and Mein, JJ.* (1886). *Williams v. Morgan*, 2 Q.L.J., 169. *Harding and Mein, JJ.* (1886). Q.

**32.—Goldfields Act 1874** (38 Vic. No. 11), Regulation 54—Duty of Warden in registering claim.]—It is against the duty of a Warden, acting ministerially, to register a claim for a greater area than that allowed by Regulation 54 of the Regulations under the *Goldfields Act 1874* (Q.), (38 Vic. No. 11), and, if acting judicially, it would also be his duty to refuse to register such claim. *Queen v. Cribb*, 2 Q.L.J., 157. *Harding and Mein, JJ.* (1886). Q.

**33.—Homestead area** (Q.)—Right to mine in—50 Vic. No. 32.]—See HOMESTEAD AREA.

**34.—Death of claim-holder—Abandonment—Forfeiture.**]—Goldfields Regulations provided that no claim should be deemed to be abandoned in consequence of the death of the holder, but should be "protected" for the benefit of his personal representatives. A. died intestate in May, 1872, being then the duly registered owner of a water race. In August, 1872, the respondent made a proper application for the same race as if it were vacant. In November, 1873, the appellant, the Public Trustee, became administrator of A. *Held*, that, as there had been no regular adjudication of forfeiture or abandonment, the appellant was entitled to the race. *Woodward (Public Trustee) v. Earle*, 2 N.Z.J.R., 12. See ADMINISTRATOR. N.Z.

**35.—Certificate of registration—Failure to renew—Forfeiture.**]—Non-compliance with a regulation prescribing the annual renewal of certificates of registration does not necessarily work a forfeiture. *Ibid.*

**36.—Claim—Action for interference with—Maintenance of pegs and boundaries.**]—Where the pegs and boundary marks of an extended claim have not been properly maintained, the claim-holder cannot maintain an action for interference with his ground against a person who has been misled and has marked out another claim upon it. *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L., 10. N.Z.

37.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 112—Miner's right—Claim.]—*Semble*, that under the *Goldfields Act* 1866 (N.Z.), (30 Vic. No. 32), a miner's right is no part of the title to a claim beyond the limits prescribed by sec. 112 of that Act. *Ibid*.

38.—Prospecting claim—Cancellation of certificate—"Prescribed conditions."—Under the Otago Goldfields Regulations, no certificate was necessary in the case of a prospecting claim. No definite amount of labour was required to be employed on such claims. If there was sufficient evidence to show that such a claim had been "left unwrought for two clear working days," within the meaning of Regulation 25, sec. 2, the claim would be deemed to have been abandoned, and the certificate was liable to be cancelled (assuming any certificate to be necessary). *Semble*, the term "prescribed conditions" in the Regulation empowering the Warden to cancel a certificate "if any of the prescribed conditions have not been complied with," meant those conditions which were prescribed for each particular class of claims, and not the general rules and regulations relating to all claims. *Cope v. Williams*, 2 N.Z.J.R. (N.S.) S.C., 235. N.Z.

39.—Mines Act 1877 (N.Z.), (41 Vic. No. 42), sec. 96—Claim—Taking in execution.]—Under the *Mines Act* 1877 (41 Vic. No. 42), sec. 96, a gold mining claim can be seized under a writ of distress or execution of any Court. *Campion v. Turton*, N.Z.L.R., 3 S.C., 337. *Williams, J.* (1884). N.Z.

40.—Partnership or joint tenancy in claim.]—An agreement to the effect that the object of the venture shall be to extract gold from auriferous earth within the limits of the claim, and after payment of expenses to divide the profits (if any), among the holders, does not constitute them partners with respect to the gold only, and joint tenants with respect to the mine itself. *Gallagher v. Talty*, 7 N.Z.L.R., 35. *Williams, J.* (1888). N.Z.

41.—Partnership or joint tenancy in claim.]—In the absence of an agreement to the contrary, a gold-mining claim taken up under the N.Z. *Mining Act* 1888 (50 Vic. No. 51), is partnership property, and not property held by the proprietors as joint tenants. *Gallagher v. Talty*, 7 N.Z.L.R., 35. *Williams, J.* (1888). N.Z.

42.—Mining Act 1886 (N.Z.), (50 Vic. No. 51)—River or creek claim—Definition of banks by Warden.]—Where it is necessary for a Warden to define the bank of a stream, he must define the existing visible banks bounding the present bed of the stream. *Rush v. Neumann*, 7 N.Z. L.R., 117. *Richmond, J.* (1888). N.Z.

43.—Extended sluicing claim—Abandonment—Adjudication of forfeiture.]—See ABANDONMENT, 2.

44.—Marking out claim—Application for lease—Default in application.]—See LEASE.

45.—Claim—Mode of working—Goldfields Act, 25 Vic. No. 4, sec. 32 (N.S.W.)—Disobedience of order.]—See PRACTICE.

46.—Claim—Share in (N.S.W.)—Transfer by infant.]—See MINING ACT 1874.

47.—Claim—Share in—Married woman—Mining Act 1874, secs. 14, 18, 79 (N.S.W.)—See HUSBAND AND WIFE.

48.—Quartz claim (N.S.W.)—Gold mining lease—Land pegged out—Boundaries—Application.]—See LEASE.

49.—Quartz claim (N.S.W.)—Miner's right—Lease—Regulations 28 and 33—Trespass.]—See LEASE.

50.—Claim—Quartz—Right to take up more than one—Regulations—Registration, effect of.]—See MINER'S RIGHT.

51.—Lateral support—Adjoining claim-holders (N.Z.)—Right to.]—See LATERAL SUPPORT.

52.—Goldfields Act 1866 (30 Vic. No. 32), sec. 62 (N.Z.)—Jurisdiction of Warden—Forfeiture—Claim—Excess of ground.]—See FORFEITURE; PRACTICE.

53.—Partnership—Abandonment of claim by partner (N.Z.)—See PARTNERSHIP.

54.—Application for claim (N.Z.)—Refusal by Warden—Appeal.]—See PRACTICE.

55.—Claim—Taking in execution—Interpleader—Title to land—Jurisdiction.]—See PRACTICE.

56.—Partnership (N.Z.)—Abandonment—Retaking of claim by one partner.]—See PARTNERSHIP.

57.—Distress (N.Z.)—Claim—What goods may be seized.]—See DISTRESS.

## COAL

1.—Coal Mines Act—Obstructing an examiner —“Mining surveyor or experienced miner.”]—The authority of the Minister was *prima facie* evidence that the person accompanying an examiner of coalfields, when he was prevented by defendant from entering a mine, was a “mining surveyor or experienced miner,” as required by sec. 38 of the *Coal Mines Act*, 39 Vic. No. 31. *Ex parte Sneddon*, 1 N.S.W.W.N., 25. *Faucett, Windeyer and Innes, J.J.* (1884). N.S.W.

2.—Coal Mines Regulation—39 Vic. No. 31, sec. 20.—Check-weigher, appointment of.]—The *Coal Mines Regulation Act* gives no power to miners to appoint a check-weigher to act from some future date; the appointment must be *in presenti*. *Per Darley, C.J.*, at pp. 110, 111:—“It may be argued that this decision will open the way to improper practices, and that the moment the manager of a mine hears that a person who is obnoxious to him has been appointed check-weigher, he will dismiss him; but if so, the proper course for the miners is to appoint a man to act then and there. He would then immediately cease to be a servant of the company, and could only be removed by order of the magistrates.” *Ex parte Morgan*, 10 N.S.W.L.R. (L.), 109; 5 W.N., 128. *Darley, C.J., Stephen and Foster, J.J.* (1889). N.S.W.

3.—Colliery (N.S.W.) — Partnership — Sale by tenant in common—Partnership liability.]—See PARTNERSHIP.

4. — Colliery (N.S.W.) — Railway — Statutory contract, breach of—Remedy.]—See STATUTE.

5.—Coal mining—Employer and employe—Defect in system—Blasting — *Volenti non fit injuria* — 39 Vic. No. 31, sec. 12, sub-sec. 19 (N.S.W.).]—See EMPLOYER AND EMPLOYEE.

6.—Coal mine (N.Z.)—Subsidence—Liability of lessee—Royalty—Accounts.]—See LEASE.

## CO-COMPLAINANT

See MINER'S RIGHT.

## COLLIERY

See COAL.

## COMMISSION

Broker.]—See PRINCIPAL AND AGENT.

## COMMITMENT

See PRACTICE.

## COMMON

1.—Goldfields common — Land Act 1862 (No. 145)—Land Act 1869 (No. 360).]—A “goldfields common,” under the *Land Act* 1862 (No. 145), which has been re-proclaimed as a “common” under the *Land Act* 1869 (No. 360), has thenceforth the same character as though originally proclaimed under the latter Act. *Sanderson v. Fotheringham*, 10 V.L.R. (L.), 289. F.C., *Starvell, C.J., Higinbotham and Williams, J.J.* (1884). V.

2.—Common—Dedicated before N.S.W. Constitution Statute (18 & 19 Vic. c. 54)—Revocation —48 Vic. No. 18, sec. 105.]—See CROWN LANDS.

## COMPANY

See MINER'S RIGHT ; PARTNERSHIP ; PRIVATE PROPERTY ; PRACTICE ; REGISTRATION ; RESIDENCE AREA.

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### I.—ADVERTISEMENT.

#### See COMPANY (DIRECTORS).

1.—Calls—Deed.]—A deed of settlement provided that calls should be made at such times and places as the directors should determine, by an advertisement in a newspaper or newspapers published at Sydney, and in a newspaper or newspapers published at Melbourne. When the advertisement in the Sydney newspaper fixed one day for the payment of the call at Sydney, and the advertisement in the Melbourne newspaper fixed another day for payment of the call at Melbourne: *Held*, that the advertisements given had been in compliance with the deed, as the advertisements were to be in one or more newspapers, and were to name such times and places—the plural being used both as to the time and the places—for payment of the calls, as the directors should determine upon. *Melbourne and Newcastle Minmi Colliery Co. Ltd. v. Hodgson*, 1 W.W. & A.B. (L.), 205. Banco (1864).

V.

### II.—ARTICLES OF ASSOCIATION.

#### See COMPANY (MEMORANDUM OF ASSOCIATION, CALLS, ULTRA VIRES).

2.—Company—Companies Act 1874, sec. 83—Meeting—Conditional notice—Notice duly given—Articles of association—Estoppel.]—The notice convening the first meeting stated that if the resolutions to wind up the company were adopted, a confirmatory meeting would be held on March 3rd. No further notice was given of the confirmatory meeting. The respondent was present at the first meeting, when the resolutions were adopted, and was also present at and took part in the proceedings of the confirmatory meeting, and raised no objection till payment of a call was demanded in the winding up. *Held*,

that as he was present when the resolutions were adopted, he had sufficient notice of the confirmatory meeting. *Alexander v. Simpson*, 43 Ch. D., 139, distinguished. The articles of association provided that twenty-one days' notice should be given of any meeting. *Held*, that the respondent, having raised no objection at the time, could not now, on summons to enforce payment of a call on the winding up, be heard to say that the notice of the confirmatory meeting was insufficient. As between a company and a contributory it is sufficient if the affidavit of the liquidator in support of a summons to enforce payment of a call made on the winding up of a company, states that the resolutions for winding up were duly passed; it is not necessary for him to show specifically that all the requirements of the Act have been complied with. *In re Katoomba Coal and Shale Co. Ltd., North's Case*, 11 N.S.W.L.R. (E.), 70. *Owen, J.* (1892). N.S.W.

3.—Company—Directors' remuneration—Articles of association—Construction—Realised profits.]—The articles of association of a silver mining company provided:—"That the sum of £500 per annum shall be paid to the directors as remuneration for their services, and the sum shall be distributed among the directors in such manner as the board shall from time to time determine, provided that the said sum shall be paid out of realised profits only, and shall be a first charge thereon." *Held* (*Stephen, J., diss.*), that the word "profits" was not to be construed as "profits of their year of service," but that the remuneration was a first charge on future profits as well as those of their year of office. *Kelly v. Broken Hill South S.M. Co.*, 14 N.S.W.L.R. (E.), 119. F.C., *Darley, C.J., Stephen and Foster, JJ.* (1893). N.S.W.

4.—Company—Articles of association—Calls—Forfeiture.]—The articles of association of a mining company required twenty-one days to be allowed for the payment of any call. The directors made a call which appeared from the minute-book to be payable in less than twenty-one days, but which was shown on affidavit to have been made payable in fact, twenty-one days after service of notice on the shareholders, and the notices themselves corresponded with that statement. The notices were signed by the secretary, and payment not having been made by the applicant within twenty-one days, a notice, also signed by the secretary (by what

authority it did not show), was served upon him, requiring payment within seven days, otherwise forfeiture, such payment to be made at the secretary's house, but to whom was not stated. Default having been made, the directors forfeited the shares. On a motion to reinsert the shareholder's name on the register: *Held*, that the forfeiture was rightly made. *Ex parte Phillips v. North Yelta M. Co.*, 3 S.A.L.R., 86. *Gwynne and Wearing, JJ.* Statutory Jurisdiction. (1869). S.A.

5.—Company—Companies Act 1864, secs. 8, 12—Increase of capital—Articles of association—Special general resolution.]—Before increasing the capital of the company by the issue of additional shares, pursuant to a power contained in the articles of association, no special resolution authorising the alteration of the "regulations of the company as originally framed" is necessary within the meaning of sec. 12 of the *Companies Act* of 1864. *Per Hanson, C.J.*, at p. 143:—"The case rests entirely on the construction of secs. 8 and 12 of the Act." *Yam Creek G.M. Co. v. Wadham*, 8 S.A.L.R., 141. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1874). S.A.

6.—Company—Companies Act 1864—"Resolutions."]—*Per Wearing, J. (arg.)*, at p. 142:—"I take the word 'resolutions' in the Act to be synonymous with the common term 'articles of association' as distinguished from the memorandum of association." *Yam Creek G.M. Co. v. Wadham*, 8 S.A.L.R., 141. *Hanson, C.J., Gwynne and Wearing, JJ.* (1874). S.A.

7.—Company—Articles of association—Memorandum of association—Preferential shares.]—Sec. 6 of the articles of association of a company empowered the directors, if authorised by special resolution as therein mentioned so to do, to increase the capital of the company by the issue of shares giving a right to preferential dividends over such capital. Sec. 56 of the same articles provided that dividends should be divided *pro rata* amongst the shareholders. The memorandum of association was silent on the subject of preferential shares. On an action for calls due on preferential shares issued pursuant to sec. 6, it was held that the issue of such shares was not *ultra vires*, and that the defendant was not entitled to a nonsuit on that ground, and that secs. 6 and 56 of the articles were not incon-

sistent. *Burrowing Copper M. Co. Ltd. v. Harvey*, 9 S.A.L.R., 14. *Hanson, C.J.*, and *Gwynne, J.* Common Law (1875). S.A.

8.—Company—Articles of association—Transfer—Debt—Liability.]—The articles of association of a company provided that "no member should be entitled to transfer a share whilst he was indebted to the company on any account whatever," and that "for all debts, liabilities and engagements due to and subsisting with the company by or on the part of any member, on any account whatsoever, the company should in all cases have a paramount lien on the shares of every such member." A member of the above company who had commenced an action against the company, in respect of which a judgment of *non pros.* had been obtained by the company, transferred to the plaintiff certain shares in the company, the costs of the action not having been taxed. The company refused to register the transfer until the costs were paid. *Held*, that the company was justified in its refusal. *Robinson v. Lady Alice G.M. Co. Ltd.*, 10 S.A.L.R., 197. *Way, C.J., Gwynne and Stow, JJ.* (1876). S.A.

9.—Company—Companies Act 1864—Articles of association—Transfer—Bona fides—Registration—Arrangement.]—The articles of association of a company provided that every registered shareholder should be entitled, in manner therein expressed, to sell and transfer his shares to any person not being under any legal disability. A shareholder lodged with the company for registration a transfer to a person in his employ of certain shares, which transfer the directors refused to register. The transferee stated in his evidence that the price given by the transferee was a fair market price, but that "there was an arrangement that if the mine turned out a big thing, he (the transferee) was to have something out of it." *Held*, that the transfer was not *bona fide*, and that the directors were not bound to register same. *In re Balhannah M. Co. Ltd.*, and the *Petition of Dalwood*, 11 S.A.L.R., 52. *Stow, J.* Equity (1877). S.A.

10.—Company—Companies Act 1864—Articles of association—Transfer—Liquidation—Contributories.]—Under the articles of association of a company, every shareholder was entitled to transfer his shares, if in the requisite form and accompanied by the requisite fee. A shareholder lodged with the secretary of the company

a transfer of certain shares, paid the registration fee, and new scrip was made out to the transferee, but never signed by the directors, nor was the transferor's name ever removed from the register. Subsequently to the lodging of the transfer, notices were sent to the transferor, as registered holder of the shares, but no steps were taken by him to have his name taken off the register. *Held*, that the transferor was liable for calls made by the liquidator after the liquidation of the company. *Great Amalgamated Gold Reefing Co. Ltd. v. Carstairs*, 11 S.A.L.R., 50. *Stow, J. Common Law* (1877). S.A.

### III.—CALLS.

See COMPANY (ADVERTISEMENT, ARTICLES OF ASSOCIATION, DIRECTORS, SHARES, WINDING-UP).

11.—*When made.*—Calls are to be considered as made at the time the resolutions making them are passed—not when they are payable. Where a rule provided that there should be an interval of one month between the making of any calls, and two calls were made at one meeting, but at an interval of one month between the time for payment of the calls: *Held*, that the rule had not been complied with. *Hodgson v. Fermoy Extended G.M. Co. Regd.*, 3 W.W. & A'B. (L.), 70. *Banco* (1866). V.

12.—*Deed.*—Where an applicant for shares in a company to be registered under the Act No. 228, and the provisional directors contemplated the signing of a deed as necessary to constitute the applicant a member of the company, and the applicant did not sign the deed, although shares were allotted to him: *Held*, that he was not a shareholder, and not liable for calls. *Guiding Star G.M. Co. Regd. v. Luth*, 4 W.W. & A'B. (L.), 94. *Banco* (1867). V.

13.—*Forfeiture — Retainer under seal.*—A company registered under Act No. 228 declared F.'s shares to be forfeited, and sold them to J. No new scrip were issued to J. J. was sued for calls on the shares which had been made since the purchase by him. He contended (1.) That the shares had not been duly forfeited. (2.) That the retainer of the attorney who appeared for the company was not sufficient, as although it was under seal, yet the seal had not been verified by the signatures of the directors. *Held*, that J. having accepted the shares, and held them, could not raise any objection, on the

ground of their having been improperly forfeited, and that the retainer was sufficient. *Jones v. Star Freehold G.M. Co. Regd.*, 4 W.W. & A'B. (L.), 223. *Banco* (1867). V.

14.—*Calls.*—Where a company registered under Act No. 228 sues a shareholder for calls, there must be a separate complaint for each call made by the company. A number of calls cannot be included in one complaint. *Ogier v. Ballarat Pyrites Co. Regd.*, A.R., 22nd Nov., 1867. V.

15.—*Notice.*—Where a clause in the deed of association or rules of a company under the Act No. 228 provided that notice of call should state the place at which it was payable, and a notice of call omitted such statement: *Held*, that the notice was bad, and that the call could not be recovered. *Robin Hood G.M. Co. Regd. v. M'Ivain*, A.R., 28th Nov., 1867. V.

16.—*Rules—Fines.*—The deed of association of a mining company formed under the Act No. 109, provided that shareholders whose calls should be in arrear should be fined at the rate of sixpence a week on each share on which calls should remain unpaid. *Held*, that it was intended by the parties to the deed that the fines should be actually paid, and that the fines were not intended to secure compensation for default. *Held*, further, that the company was entitled to deduct such fines from the dividends payable to the defaulting shareholder. *Cotchett v. Hardy*, A.R., 2nd Dec., 1868. V.

17.—*Liability—Acceptance in writing.*—One of the rules of a mining company, registered under the Act No. 228, was as follows:—"All transfers of shares in the company from or by any shareholder shall be made in writing." B. purchased, at various times, thirty shares in the company, and the manager registered him as the holder of the shares. On being sued for calls on these shares, B. admitted that at one time he was the holder of thirty shares in the company, but denied that he had ever accepted, in writing, any of the transfers. He also admitted that he had attended a meeting of shareholders as the holder of five shares, the transfer of which he had never accepted in writing. The magistrates held him liable. *Held*, on appeal, that as the shares were transferred to him and appeared in his name in the register, the Court could not presume that he had transferred them

to any one else, without proof; and that there was evidence to go to the magistrates of his liability, which he had not disproved. Appeal dismissed. *Reefs G.M. Co. v. Bennett*, 6 W.W. & A'B. (L.), 79. Banco (1869). V.

18.—Evidence of membership—Payment of calls.]—Where a plaintiff's title to shares in a mining company was denied by defendants, it was held that the fact of a duly constituted agent of the defendants having applied to the plaintiff for a call, after payment of all the original calls, his payment of that call, and the receipt thereof by that agent, formed sufficient evidence of membership, as against the defendants. *Ogier v. Smith*, N.C., 3. Banco (1869). V.

19.—Act No. 228, sec. 37—Justices—Jurisdiction.]—Although by Act No. 228, sec. 37, payment of calls due by a shareholder in a company registered under the Act, may be enforced before justices, yet the jurisdiction of the County Court and Supreme Court is not ousted thereby, and calls may be recovered in the latter Courts. *Cooper v. Bath*, 2 A.J.R., 86. Banco (1871). V.

20.—Rules—Recovery of calls—Rules ousting jurisdiction of the Courts.]—A rule of a company, after declaring that shares might be forfeited for non-payment of calls, provided that the company should have no power or authority to enforce and should be barred from enforcing any call or calls in any Court of law or equity. R. sold C. 100 shares in the company, and before the shares were transferred into C.'s name in the books of the company a call was made which R. paid, he being the registered holder. R. then sued C. to recover the amount so paid by him. Held, that the rule was binding on the parties, that the course provided by the rules should have been followed, and that as the call could not have been recovered from R. the payment by him was voluntary and he could not recover it from C. *Coulter v. Wardill*, 1 A.J.R., 165. Banco (1870). V.

21.—Notice—Rules.]—A rule of a company registered under the Act No. 228, provided that notices of calls should state the time and place where the calls should be payable. C. was sued for calls. It was objected that the notice of call did not state the time and place of payment. Held, a fatal objection, and that the company

could not recover. *Clunes and Blackrood Co. v. Coulter*, 1 A.J.R., 172. Banco (1870). V.

22.—Calls—Jurisdiction of justices—Fraud—Resolutions of extraordinary meeting.]—A mining company registered under the Act No. 228, at an extraordinary meeting authorised the issue of 500 new shares, and resolved that present shareholders were to have a preferential right to a number of the new shares in proportion to the number of old shares held by them. R., a holder of old shares, applied for and had allotted and transferred to him six of the new issue, on which he paid his calls. Some of the shares of the new issue had been allotted to persons who were not shareholders previously, and some to dummies, and evidence was given tending to show that some of the directors who had taken up the new shares had taken them up in the names of dummies. R. was sued by the company for further calls on the new shares. He resisted payment on the ground that the resolutions of the extraordinary meeting had not been carried out, and that the new shares had not been issued *bond fide*. The justices found for the defendant. Held, on appeal, that there was no evidence of fraud, and that whether the resolutions for the increase of capital were specifically carried out or not, was not a question for the justices to determine. *Creswick Grand Trunk Co. v. Rowell*, 2 A.J.R., 35. Banco (1871). V.

23.—Liquidator—Winding-up—Act No. 409, secs. 52, 90, 105.]—A company in course of being wound up, cannot sue for calls made before the winding-up. The liquidator alone can sue. *Great Northern Co. v. Maughan*, 4 A.J.R., 161. Banco (1873). V.

24.—Act No. 409, secs. 52, 56—Forfeiture—Sale—Register.]—Proceedings for calls under Act No. 409, sec. 52, must be taken in the County Court within fourteen days from the day when the call is payable. This limitation does not apply to proceedings before justices, and any number of calls may be included in one complaint. The forfeiture by non-payment under sec. 54 is not absolute, and the shareholder remains liable for calls until the shares are sold under sec. 55, and, *Semble*, he is not released from liability so long as his name remains on the register, *sed quere*. *Guthridge v. Gippelander G.M. Co.*, 5 A.J.R., 161. Banco (1874). See 27 *infra*, and *Companies Act 1890* (No. 1074), secs. 239, 241, 242, 247. V.

25.—Mining company—Validity of call.]—



Where by resolution of directors a call is made, but no time or place of payment therein fixed, none being required by the rules of the company: *Semble, per Moleworth, J.*, subsequent verbal directions thereon are not sufficient. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 10, 98 (1883). V.

26.—Mining company—Call—Forfeiture—Notice.]—Where a company had power, on non-payment of a call (1) to debit the shareholder's account therewith and with interest thereon at 15 per cent., or (2) to proceed against him to recover it, or (3) to forfeit the shares; and the shareholder was served with notice that the directors would, at their option, proceed to forfeit and sell the shares for the amount due, and 15 per cent. interest: *Held*, such notice was bad. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 10. *Moleworth, J.* (1883). V.

27.—Manager's right to sue.]—The manager of a mining company, registered under Part I. of the *Mining Companies Act* 1871 (No. 409), and he alone, has the right to sue for unpaid calls, subject, whether before justices or in the County Court, to the condition that proceedings be commenced within fourteen days from the day when the amount was payable. *Guthridge v. Gippslander G.M. Co.*, 5 A.J.R., 161; and *Reg. v. MacGregor, ex parte Wilkinson*, 6 V.L.R. (L.), 167, over-ruled. *King's Birthday Q.G.M. Co. Ltd. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C., *Higinbotham, Williams and Holroyd, J.J.* (1885). See 24 *supra*, and *Companies Act* 1890 (No. 1074), secs. 239, 241, 242, 247. V.

28.—Mining Companies Act 1871 (No. 409), sec. 50—Call—Notice of day call payable—Reasonable notice.]—An advertisement in accordance with the terms of the *Mining Companies Act* 1871 (No. 409), sec. 50, stating when a call will be payable, must be published a reasonable time before the call is payable, and the question whether or not it was a reasonable time before, is a question of fact for the judge or jury in each case. Seven days' notice in the case of a company having its registered office in Melbourne, where the call is payable, is a reasonable notice, the place where the company carries on operations, or where the shareholders are, being immaterial. *Moore v. Wheal Byjerkerno Tin M. Co.*, 17 V.L.R., 680; 13 A.L.T., 108. *Webb, J.* (1891). V.

29.—Action for—Plea of alleged misrepresentation by directors that calls would be devoted to a certain purpose—No allegation of fraud—No repudiation of shares.]—To an action for calls on shares in a limited company, the defendant, a shareholder, pleaded that the plaintiff company, in order to induce him to buy the shares of one H., represented to the defendant that if he would purchase H.'s shares the call then due and all future calls would be applied for the purpose of developing the property, and the plea went on to aver that the said calls sued for were made by the directors for the purpose of reducing their indebtedness, and that nothing would be left for the development of the property, and the defendant's shares would become wholly useless to him. *Held*, on demurrer, that the plea was no answer to the action, as no fraudulent misrepresentation of an existing fact was alleged. *Bendemeer Tin M. Co. v. Newton*, 8 N.S.W.L.R. (L.), 28; 3 W.N., 98. *Darley, C.J., Faucett and Innes, J.J.* (1887). N.S.W.

30.—Company—Deed of settlement—Supplemental deed—Mortgage—Unpaid calls—"Property."—By the original deed of settlement the trustees and directors of a mining company (which was not at first a limited or registered company but became so afterwards), were empowered to borrow "on mortgage or charge of the property, or on the bonds, debentures or loan-notes of the company," any sum or sums of money not exceeding £3,000, "and so as no sum or sums of money shall be borrowed by the company until the whole of the calls (if any), made by virtue of these presents shall be paid up." By a supplemental deed it was provided (*inter alia*), "that such parts of the said deed of settlement as prevent such borrowing until the whole of the calls made shall be paid up, shall be and the same are repealed." By a deed executed subsequently to the above supplemental deed, the unpaid calls of the company were expressed to be mortgaged to the plaintiffs to secure the amount of an advance made by them. On the company being wound up under the superintendence of the Court, the plaintiffs claimed that the amount of their principal and interest should be paid to them out of a sum realised in respect of a call made by the official liquidator, before any distribution amongst the general body of the creditors. The primary judge held that the term "property" was of sufficiently exten-



sive signification to include the unpaid calls of the company, but that the subsequent proviso in the original deed negatived such a construction in the present instance, and that the supplemental deed being silent as to the nature of the property intended to be made subject to mortgage must be held to refer only to such as would have been available for that purpose by virtue of the original deed, and would therefore not extend to the unpaid calls. *Bank of South Australia v. Abrahams, In re Talisker M. Co. Ltd.*, 6 S.A.L.R., 98. *Gwynne, J. Equity* (1872). See *Ansted v. Land Co. of Australia*, 14 N.S.W.L.R. (E.), 330 (1893). S.A.

**31.—Company—Appeal—Companies Act 1864—Companies Amendment Act 1870—Deed of settlement—Unpaid calls—Property.]**—By their original deed of settlement the trustees and directors of a mining company, unlimited liability, were empowered to borrow “on mortgage, or charge of the property, or on the bonds, debentures or loan-notes of the company, and any other security which may be available,” any sum or sums of money not exceeding £3,000, “and so as no sum or sums of money shall be borrowed by the company until the whole of the calls (if any), made by virtue of these presents shall be paid up.” By a supplemental deed it was provided (*inter alia*), “that such parts of the said deed of settlement as prevent such borrowing until the whole of the calls made shall be paid up, shall be and the same are repealed.” By a deed executed subsequently to the above supplemental deed, the unpaid calls of the company were expressed to be mortgaged to the plaintiffs to secure the amount of an advance made by them. On the company being wound up under the superintendence of the Court, the plaintiffs claimed that the amount of their principal and interest should be paid to them out of a sum realised in respect of a call made by the official liquidator, before any distribution among the general body of creditors. The Court held (reversing the above decision of the primary judge), that the words “if any” in the original deed showed that the limitation was intended to apply only to calls actually made, and not to future calls, and that the term “property” was of sufficiently extensive signification to include the unpaid calls of the company, and that even if excluded by the condition in the original deed, yet that condition having been repealed such

limitation no longer existed. *In re Talisker M. Co. Ltd.*, 7 S.A.L.R., 167. *Hanson, C.J.*, and *Wearing, J. (Gwynne, J., diss.) Equity* (1873). Decision of *Gwynne, J.*, reported 6 S.A.L.R., 98, reversed; but see 9 S.A.L.R., 246; L.R. 6 P.C., 265, *infra* (1875). S.A.

**32.—Company—Deed of settlement—Unpaid calls—“Property”—“Any available security.”]**—Unpaid calls, even if they were not included in the term “property” in the above-mentioned deed of settlement, would certainly come within the meaning of “any available security” used in the supplemental deed aforesaid. *In re Talisker M. Co. Ltd.*, 7 S.A.L.R., 167. *Per Hanson, C.J.* (1873). But see 9 S.A.L.R., 246; L.R. 6 P.C., 265 (1875). S.A.

**33.—Company—Power of directors—Mortgage of unpaid capital—Future calls.]**—A power in a deed of settlement of a joint stock company, authorising the directors to mortgage or charge the property of the company, does not authorise them to include in such mortgage or charge future calls, or in other words, the unpaid capital of the company. *Ex parte Stanley*, 4 De G. J. & S., 437; 33 L.T. (N.S.), 536, approved. The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the company, a precedent condition to the absolute proprietary right of the company therein being the due making of a call by a resolution of the board of directors. The decision of the Full Court (*supra*), reversed. *In re Talisker M. Co. Ltd.*, *Bank of South Australia v. Abrahams*, 9 S.A.L.R., 246; L.R. 6 P.C., 265; 44 L.J.P.C., 76; 23 W.R., 668; 32 L.T. (N.S.), 277. *J.C.*, *Sir W. Colville, James, L.J.*, *Sir Barnes Peacock, Mellish, L.J.*, and *Sir Montague S. Smith* (1875). See also *Ansted v. Land Co. of Australia*, 14 N.S.W.L.R. (E.), 330 (1893). S.A.

**34.—Company—Companies Act 1864, sec. 27—Increase of capital—Notice—Application—Allotment call—Register of shareholders—Evidence.]**—A person who has applied to a company for shares, but not paid any calls, though he may not be entitled to the full benefit of membership, is liable for calls. *Per Hanson, C.J.*, at p. 71:—“Under sec. 27 of the Act the defendant appears to me clearly to be a member of the company, for his letter of application is a distinct authority to put him upon the register of shareholders. The register, therefore, is con-

clusive evidence against him." *Winn's G.M. Co. (Northern Territory) Ltd. v. Wyld*, 8 S.A.L.R., 66. *Hanson, C.J., and Wearing, J.* Common Law (1874). S.A.

**35.—Company—Companies Act 1864, sec. 33.**—Increase of capital—Notice—Directory merely—Subsequent calls.]—Sec. 33 of *Companies Act* of 1864, requiring notice of increase of capital to be given to the Registrar of Companies within fifteen days from the passing of the resolution authorising increase, is merely directory, and the giving of such notice is not a condition precedent to the bringing an action for calls subsequently made. *Winn's G.M. Co. (Northern Territory) Ltd. v. Wyld*, 8 S.A.L.R., 66. *Hanson, C.J., and Wearing, J.* (1874). S.A.

**36. — Companies Act 1864 — Contributing liquidation calls — Transfer — Laches.]**—About six weeks before a company went into liquidation, L. transferred certain shares to H., and duly lodged the transfer with the secretary. The directors wrongfully neglected to register the transfer, but no intimation of such non-registration was given to L. until after the company was in liquidation, when the liquidator gave him notice of intention to place his name on the list of contributories. L. wrote in reply to the liquidator, reminding him that he had transferred his shares, and heard nothing more of the matter until nearly two years after, when he was sued for certain calls made by the liquidator. On application by L. to have his name removed from the register and list of contributories: *Held*, that he had not been guilty of any laches to debar him of his right to have his name so removed. *Levi v. Wheal James M. Co.*, 12 S.A.L.R., 26. *Way, C.J.* Equity (1878). S.A.

**37.— Company — Equity appeal — Companies Act 1864—Transfer—Registration ultra vires.]**—The memorandum of association of a company provided that the company was to be limited. The 53rd clause of the company's articles of association empowered the directors to make calls from time to time not exceeding 2s. 6d. at any one period, "provided always that in the event of a larger sum being required for the purpose of working the mines on the property of the company, over and above the call which the directors are authorised to make on the property of the company, it shall be lawful for the shareholders at any general or special meet-

ing to make such further call or calls as the majority of shareholders at such meeting may think proper." At a general meeting, the notice convening which stated the object to be to make a call for the purpose of liquidating the liabilities of the company, a call of 13s. 6d. per share was made. *Held* (affirming the decision of the primary judge, 12 S.A.L.R., 167), that as the call was not being made for the purpose of working the mines, the payment could not be enforced. *Devon Consols M. Co. v. Wood*, 13 S.A.L.R., 40. *Way, C.J., Gwynne and Boucaut, JJ.* Equity (1879). S.A.

**38.—Calls—Notice of—Time.]**—A rule of a mining company provided that notice of a call should be published "five days prior to the day on which the call was made payable, to be reckoned inclusive of the day of publication and the day of payment." *Semble*, that a publication on a specific day more than five days prior to the date of payment was sufficient. *Greenwood v. The Crown Prince G.M. Co.*, 1 N.Z.J.R. (N.S.) S.C., 41. N.Z.

**39. — Mining Companies Act 1872 (N.Z.), (40 Vic. No. 1), sec. 52—Action for calls—Time.]**—*Per Williams, J.* :—Though sec. 52 of the *Mining Companies Act* 1872 (40 Vic. No. 1), did not enable a manager to sue for calls in his own name after fourteen days from the date when the call was made payable: *Semble*, the ordinary remedy of the company to sue for calls as a debt due was not taken away. *Shotover Terrace G.M. Co. v. Armstrong*, 1 N.Z.J.R. (N.S.) S.C., 95. N.Z.

**40. — Mining Companies Act 1872 (N.Z.), (36 Vic. No. 33), secs. 52, 54, 90—Action for calls—Time—Forfeiture.]**—The amount of a call due by a shareholder in a company incorporated under the *Mining Companies Act* 1872 (36 Vic. No. 33), cannot be recovered by action after the lapse of fourteen days from the day when the call was payable. If no proceedings are taken within such fourteen days, and the call be unpaid for twenty-one days after becoming due, the shares are absolutely forfeited by sec. 54, and therefore, the debt is extinct, or if not the debt the remedy, after such forfeiture by sec. 90, and the right of action is not saved by the fact that ineffectual proceedings had been taken to recover the amount of the call within fourteen days after it was payable. *Dictum of Williams, J.*, in *Shotover Terrace G.M. Co. v. Armstrong*, 1

N.Z.J.R. (N.S.) S.C., 95, not followed. *Seaton v. Lloyd*, 3 N.Z.J.R. (N.S.) S.C., 107. *Prendergast, C.J.*, and *Richmond, J.* N.Z.

41.—Mining Companies Act 1872 (N.Z.), (36 Vic. No. 33), secs. 52, 54, 55, 56—Mining Companies Act Amendment Act 1883 (47 Vic. No. 18), secs. 9, 11—Action for calls—Forfeiture—Option of company.]—Sec. 54 of the *Mining Companies Act* 1872 must be interpreted as meaning that if a call upon shares in a gold mining company be not paid within twenty-one days after it is made, or sued for within fourteen days, the shares become *ipso facto* forfeited, and the company has no power to exercise any further option as to whether it will accept such forfeiture or not. *Seaton v. Lloyd*, 3 N.Z.J.R. (N.S.) S.C., 107, discussed and considered. *Wilberfoss v. Try Again G.M. Co.*, N.Z.L.R. 2 C.A., 315. C.A., *Johnston, A.C.J.*, *Gillies* and *Williams, J.J.* (reversing *Richmond, J.*), (1884). N.Z.

42.—Mining Companies Limited Liability Act 1865 (N.Z.), (29 Vic. No. 26)—Mining Companies Act 1872 (36 Vic. No. 33), secs. 124, 125—Mining Companies Act 1886 (50 Vic. No. 19), sec. 151—Calls—Act under which to be made.]—The constitution of a mining company, registered under the *Mining Companies Limited Liability Act* 1865 (29 Vic. No. 26), is subject to the provisions of the *Mining Companies Act* 1886 (50 Vic. No. 19), and calls can only be made and recovered under the latter Act. *Tokalea G.M. Co. v. Mowbray*, 6 N.Z.L.R., 21. *Gillies, J.* (1887). N.Z.

43.—Unregistered mining partnership—Covenant to pay calls—Action against shareholder.]—See COMPANY (SHARES).

44.—Company—Foreign judgment—Action for calls in New Zealand—Creditors Remedies Act.]—See PRACTICE, 168.

45.—Calls—Agent—Unregistered transfer—Money paid—Request.]—See COMPANY, 249.

#### IV.—CAPITAL.

See COMPANY (ARTICLES OF ASSOCIATION, CALLS, DIRECTORS, MEMORANDUM OF ASSOCIATION, SHARES, ULTRA VIRES).

46.—Companies Act 1864—Increase of capital—Articles of association.]—*Hanson, C.J.* (arg.), at p. 142, distinguished this case from *Peninsular Co. v. Fleming*, 27 L.T. (N.S.), 93, on the ground that there the capital was sought to be

augmented by increasing the individual liability of the old shareholders, not by the issue of new shares. *Yam Creek, &c., Co. v. Wadham*, 8 S.A.L.R., 141 (1874). S.A.

#### V.—DIRECTORS.

See COMPANY (ARTICLES OF ASSOCIATION, CALLS, MEETINGS, SHARES, ULTRA VIRES).

47.—Borrowing money.]—By the Act No. 228 the directors are substantially the company. The whole of the management of the company is vested in them. They have to conduct its affairs, so that speaking of the directors, practically and legally, the company is meant. It appears that the principle to be extracted from the *Royal British Bank v. Turquand*, 6 E. & B., 327, is, that if a person profess to do a certain act, and has the power to do it, it will be presumed that he has not from negligence, or any other cause, failed to observe the preliminaries which the Act or deed imposes upon him. *Re Tyson's Reef Company, ex parte Holmes*, 3 W.W. & A'B. (L.), 162. Banco (1866). V.

48.—Borrowing money.]—Although it may be presumed that before the directors of a company under Act No. 228 borrow money, they have received the necessary authority so to do, yet the contract must be by all the directors, or by a quorum, where a quorum is provided for; and where four out of five directors borrowed money, no quorum being provided for: *Held*, that the company was not responsible, and that such a defect could not be rectified by all or a quorum of the directors subsequently adopting the act of their predecessors, without consideration. *The Colonial Bank of Australasia v. Cherry and the Loch Fyne G.M. Co. Regd.*, 4 W.W. & A'B. (L.), 177. Banco (1867). V.

49.—Deed—Contract—Decree.]—A provision in the deed of association of the St. George United Co., Regd., required the consent of a general meeting to any contract exceeding £1,000. All the directors, with the exception of one, agreed to a compromise with another company concerning some disputed ground, over the value of £1,000, without such consent, and agreed to a decree being obtained in the Court of Mines, embodying the stipulations of the compromise. *Held*, that the word "contract" should not be read as "bargain," but in a limited and more popular sense; that it was not applicable to the

present case; that the directors had authority—as agreed—to make the compromise under the Act No. 228, sec. 8, sub-sec. 3; that provisions of deeds of association as to meetings of directors operate generally as to the rights of the company between themselves, not so as to the validity of dealings with strangers, and that the decree was binding. *Albion Co. Regd. v. St. George United Co. Regd.*, 4 W.W. & A'B. (M.), 55. *Molesworth, J.* (1867). V.

**50.—Rules.]—**A rule of a company under Act No. 228 providing for the retirement of the directors every six months is not *ultra vires*. The words of sec. 39 of Act No. 228, provide for the retirement of directors at least annually, but do not prevent the making of rules for a more frequent retirement of directors. *Barfold G.M. Co. Regd. v. Craig*, A.R., 9th July, 1867. V.

**51.—Plea—Bank account—Cheques.]—**Motion for non-suit on the grounds—(1) that the registration of the defendant company was not proved, (2) that the overdraft was authorized by a quorum of three of a board of ten directors; and to enter a verdict for the defendant, on the ground that the cheques on which the overdraft was made were signed by one instead of two directors. *Held*, that under the plea of never indebted, the registration of the company was not put in issue; that there was only one board of directors, and that the quorum was right. "The directors have by the Act the management of the company. The board of directors had formally opened an account with this bank; accounts had been regularly passed by the board for payments, and such payments were made by that bank. Thus on a duly constituted bank there was an order for payment by a duly constituted agent, and after payment by the bank the same agent passed the payment as correct. We think that is sufficient in this particular case, and that the informality in the mode of payment does not vitiate it." *Bank of New South Wales v. Moyston Grand Junction Co. Regd.*, 1 A.J.R., 131. Banco (1867). V.

**52.—Promissory note—Personal liability.]—**The directors of a mining company registered under the Act No. 228 gave a joint and several promissory note, in which were the words "value received on account of the company," to a creditor of the company. *Held*, that the makers of the note were personally liable, and that it was extremely doubtful whether under the *Mining*

*Companies Limited Liability Act* (No. 228), any company could make a promissory note or bill of exchange. *M'Mullen v. O'Connor*, 5 W.W. & A'B. (L.), 200. Banco (1868). V.

**53.—Election of directors—Validity of rules—Calls.]—**All the directors of a company registered under Act No. 228 cannot hold office for more than a year from the date of their election, although the rules of the company provide that the directors shall remain in office until others are elected. Calls made by directors more than a year in office are invalid, and cannot be recovered. *Barfold Estate G.M. Co. v. Klingender*, 6 W.W. & A'B. (L.), 231; N.C., 25. Banco. (1869). V.

**54.—Agency—Borrowing money—Duty of creditor.]—**One of the rules of a company registered under the Act No. 228, was as follows:—"All payments shall be made by drafts or cheques on the bankers of the company, and shall be signed by two directors and by the manager for the time being." The banks allowed the company to overdraw their account by honouring cheques signed in accordance with the rule. In an action by the bank against the company to recover the amount of the overdraft, it was contended for the company, defendants, that the directors were not the agents of the company to borrow money unless authorised by an extraordinary meeting. *Held*, that the bank was bound to do no more than read the Act under which the company was registered and the rules of the company; that the directors could act as agents for the company, and that the defendants were liable. *Bank of New South Wales v. Undaunted G.M. Co.*, 1 A.J.R., 131. Banco (1870). V.

**55.—Qualification of directors.]—**A rule of a company, registered under Act No. 228, provided that a board of directors, consisting of seven shareholders, each of whom should be registered in the books of the company for ten contributing shares, should be elected to conduct the business of the company. At the time of the making of a call, one of the directors who made it had ceased to be the holder of ten contributing shares, although he had been such holder at the time of his election. *Held*, that the call was good, although the director did not continue to hold the shares, as the rule applied to qualification existing at the time of election,

and not afterwards. *Reeves v. McCafferty*, 1 A.J.R., 153. Banco (1870). V.

**56.—Quorum—Power to bind company—Contract.]**—A. sued a mining company, registered under the Act No. 228, to recover damages for breach by the company of a contract entered into by it with him. The rules of the company required the directors to fix the quorum of directors, and such quorum had not been fixed when the contract with the plaintiff was made, but a certain number of the directors, apparently acting as a quorum, made the contract. It was argued for the company that the non-appointment of a quorum vitiated the contract. *Held*, that a stranger is only bound to read the Act of incorporation and the deed of association, and nothing more. If he is satisfied that they have been complied with, and there is nothing in the documents brought home to him to show non-compliance, the company would be bound. As the directors had full authority to appoint a quorum, and had acted as if they had done so, the plaintiff was entitled to assume that they had done that which they ought to have done, and act accordingly. *Anderson v. Duke and Timor G.M. Co.*, 1 A.J.R., 161. Banco (1870). V.

**57.—Appointment—Extraordinary meetings of company.]**—Rule 15 of a company, registered under the Act No. 228, provided that an extraordinary meeting of the company should have full power to rescind or vary any resolutions passed at any previous meeting of the company. Rule 17 provided that the directors should be elected at each annual meeting of the company, to be held in January in each year, and should continue in office till the next annual general meeting. W. was elected a director at the annual general meeting held in January, 1870. At an extraordinary meeting, held in July, 1870, the resolution of the annual meeting, by which he was elected a director, was rescinded without notice, and S. appointed a director in his stead. *Held*, that rule 15 did not give the extraordinary meeting power to rescind the resolution of the annual meeting, appointing the directors, and that S. had been improperly elected, and W. still remained in office. *Schaw v. Wekey*, 1 A.J.R., 161. Banco (1870). V.

**58.—Responsibility of directors after resignation—Substantial resignation—Transfer of shares—Ceasing to act—Official agent.]**—Two

directors of a company, registered under Act No. 228, instead of formally resigning their offices as directors, transferred their shares with the intention of ceasing to be directors; and they did cease to act as directors, and other persons were appointed to act in their stead. At the time at which this occurred there was no litigation pending, nor was the mine in a hopeless state. Afterwards an order was made for winding up the company. In a suit by the official agent against the two directors for acts done by the directory after they had so transferred their shares, and had so ceased to act: *Held*, that they had substantially resigned their position as directors, and that they were not responsible for what their co-directors subsequently did. *Reeves v. Croyle*, 2 A.J.R., 14. F.C. (1871). V.

**59.—Company—Directors' meeting—Directors' quorum—Authority to make demand to maintain detinue.]**—An action of detinue was brought by a company, registered under Act No. 228, for the recovery of certain books, their property. By the rules three directors formed a quorum. An authority purporting to be signed by three directors was given to K. to demand the property on behalf of the company. It was proved that the names had not been affixed to this document at any meeting of the board, nor was any resolution passed ordering or ratifying it. *Held*, that a demand made in pursuance of such an authority was not sufficient. *Aladdin and Try Again G.M. Co. v. Schaw*, 2 A.J.R., 20. Banco (1871). V.

**60.—Paying dividends out of overdraft—Anticipating profits—Mistake—Fraud—Responsibility of directors—Official agent.]**—The directors of a company, registered under the Act No. 228, made an arrangement with the bankers of a company for an overdraft, and to meet the overdraft the proceeds of the mine were paid in from time to time; in anticipation of the proceeds four dividends were paid and were duly met by the yield from the mine. A fifth dividend was also paid in anticipation of the proceeds, but they fell short of the amount overdrawn for the dividend. This course of paying dividends out of overdrafts was not authorised by the rules of the company. The company was ultimately wound up. In a suit by the official agent against the directors to make them liable for the amount of dividends so paid: *Held*,

that at the utmost the directors had only anticipated profits, and that although there might have been mistake or error there was no fraud—no such malappropriation of assets as to enable the official agent to succeed. “Although acts of shareholders and directors may be impugned by the official agent when he sues for creditors, and although in that respect he may be in a far higher position than if he sued as for shareholders, yet he can only place them in a position of being charged with items of which they are unable to discharge themselves.”—*Per Stowell, C.J. Reeves v. Croyle*, 2 A.J.R., 13 (1871).

V.

**61. — Personal responsibility — Warranty — Representation.]**—Two out of five directors of a mining company, registered under Act No. 228, gave to the manager of the Colonial Bank of Australasia the following letter:—“Sir, I have to inform you that we, as directors of the Loch Fyne Quartz Mining Company, have appointed Mr. Charles Ernest Clarke to be legal manager of the company, and have authorised him to draw cheques on account of the said company. We remain, &c., &c., THOS. CHERRY, JOHN McDUGALL, Directors Loch Fyne Quartz Mining Company, Registered.” After this letter was deposited by Clarke with the manager of the bank, advances to a large amount were made by the bank on cheques drawn by Clarke purporting to bind the company. It afterwards turned out that Clarke was not authorised by the company to draw the cheques, and the bank sued the two directors who had signed the letter. *Held*; that Cherry and McDougall were personally responsible. “If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. In short he undertakes for the truth of his representation.” *Colonial Bank v. Cherry*, L.R. 3 P.C., 24; 38 L.J.P.C., 49; 21 L.T., 356; 17 W.R., 1031; N.C., 38. J.C., *Sir J. W. Colvile, Sir J. Napier, and Giffard, L.J.* (1869). V.

**62.—Bill of sale to—Sale voidable—Dealings with persons in fiduciary situations.]**—T., the managing director of a company registered under the *Companies Statute*, took a bill of sale over

the company's plant and property, by way of mortgage for advances. He seized and sold under the bill of sale, his wife becoming the purchaser. *Held*, that the sale was voidable at the election of the company. T. was also a partner in another concern, with which partnership he bought and sold as for the company of which he was director. *Held*, that such dealings by persons in fiduciary positions are contrary to the principles of Courts of Equity, and persons so dealing are subject to the matter being adjusted according to the true value of the articles bought or sold. *Australasian Boot Co. v. Thomson*, 3 A.J.R., 96. *Molensworth, J.* (1872). V.

**63.—Criminal prosecutions — Authority — Malicious prosecution—Liability of company.]**—An incorporated mining company cannot institute proceedings against persons for a conspiracy to depreciate the value of the shares in the company by means of false reports, unless the corporation itself is directly injured, as distinguished from the shareholders; and when directors institute such a prosecution on behalf of the company, and the prosecution fails, the company are not liable in their corporate capacity in an action for malicious prosecution, unless it be shown that the acts of the directors were ratified by the company. *Thurling v. North Cornish Co. and Beckett*, 3 A.J.R., 113. *Banco* (1872). V.

**64.—Estoppel.]**—*Semble*, that a person who, as director of a company, acquired a knowledge of an imminent defect in the company's title to their claim, is not estopped from taking advantage of such defect by suit to obtain possession, after he has ceased to be a director, and has severed his connection with the company. *Lennox v. Golden Fleece Co.*, 4 A.J.R., 154. *Molensworth, J.* (1873). V.

**65.—Act No. 228, sec. 39—Directors de jure and de facto—Forfeiture—Call.]**—A rule made under Act No. 228, sec. 39, by a majority in number and value to the effect that in default of the election of their successors, directors should continue in office beyond a year, is invalid. *Semble*, it would have been valid before incorporation if made by all the shareholders. A rule providing that the powers of the board of directors shall not be suspended so long as there exists a quorum is valid. A call or forfeiture, to be legal must be made by directors, not merely *de facto*, but *de jure*. A shareholder is not

estopped from disputing a forfeiture or call by reason of his having paid previous calls, or by statements on the scrip certificates. *Schmidt v. Garden Gully Co.*, 4 A.J.R., 137. Banco (1873). V.

**66. — Notice — Advertisement — Managers — Parties.**—In the absence of rules, where there is no legally appointed board of directors, it is competent for a company at an extraordinary meeting, or any general meeting, to elect a full board on proper notice. Apart from statute or rules, notice cannot be given by advertisement. Managers, as a general rule, ought not to be made defendants in suits against companies. *M<sup>r</sup> Lister v. Garden Gully United Co.*, 5 A.J.R., 152. *Molesworth, J.* (1874). V.

**67. — Election of — Quorum — Extraordinary meeting—Injunction.**—If at an annual meeting of a mining company, which was incorporated under Act No. 409, there is no quorum present, but no one draws attention to the fact, or objects, and the meeting affects to elect directors: *Semble*, that such an election is valid. *Quere*, whether an extraordinary meeting of a mining company has power to elect directors. Where there are two sets of persons, each claiming to be the legally appointed board of directors of a company, the Court is disinclined to interfere on an interlocutory motion. *Old Welshman's Reef G.M. Co. No Liability v. Bucirde (or Bamford)*, 7 V.L.R. (E.), 12; 2 A.L.T., 129. *Molesworth, J.* (1881). V.

**68.—General meeting—Quorum—Election of directors—Sham suit in name of company.**—If at an annual meeting of a mining company there is no quorum present, although the meeting be held in good faith, and everyone but the manager believe there is a quorum present, and no objection be taken for want of a quorum, yet an election of directors at such meeting is invalid. Where a suit was brought in the name of a company as nominal plaintiff, but as the Court believed, without the authority of the company, and really by the manager to work out his own ends, the Court dismissed the bill with costs. *Old Welshman's Reef Co. v. Bucirde (or Bamford)*, 7 V.L.R. (E.), 115; 3 A.L.T., 45. *Williams, J.* (1881). V.

**69.—Mining company—Guarantee—Directors —Power to bind company—Personal liability of directors.**—The directors of a mining company

gave a guarantee to a bank, headed "The New Ringwood Antimony Mining Company Limited," and commencing, "We, the directors of the New Ringwood Antimony Mining Company Limited,"

&c. Opposite to the signatures of the persons giving the guarantee was written "Directors of," &c. The seal of the company was not affixed. *Held*, that the guarantee was the personal guarantee of the directors, and was not binding on the company, it not purporting to be executed by them as directors of the company, and that even if it had purported to be given by the directors as such, it was beyond their powers to bind the company by such a guarantee. *White v. Bank of Victoria*, 8 V.L.R. (M.), 8; 3 A.L.T., 90. *Stawell, C.J.* (1882). V.

**70. — Mining company—Sale of property — Authority of directors.**—The directors of a mining company have authority to sell parts of the property of the company, not being the whole of it. *Baw Baw Sluicing Co. Ltd. v. Nicholls*, 9 V.L.R. (L.), 208; 5 A.L.T., 73. *Stawell, C.J., Higinbotham and Holroyd, JJ.* (1883). V.

**71.—Mining company — Contract for sale of property—Authority of directors—Extraordinary meeting.**—Where the directors of a mining company stipulate in a contract of sale that the authority of an extraordinary meeting shall be obtained, that is sufficiently complied with by a resolution of such meeting authorising a sale generally, and not pointing to the particular contract. *Baw Baw Sluicing Co. Ltd. v. Nicholls*, 9 V.L.R. (L.), 208; 5 A.L.T., 73. *Stawell, C.J., Higinbotham and Holroyd, JJ.* (1883). V.

**72.—Remuneration—Articles of association—Construction—Realised profits.**—*Per Foster, J.*, at p. 132:—"The word 'board' has been treated in the argument for the defendants in a way which, I think, its meaning does not justify. There are no subsequent boards; there is only one board existing in an unbroken continuity from year to year; it is the members composing the board which change." *Kelly v. Broken Hill South S.M. Co.*, 14 N.S.W.L.R. (E.), 119 (1893). N.S.W.

**73. — Injunction — Breach of — Contempt.**—What constitutes sufficient notice to directors of a mining company of an injunction, restraining them from paying over dividends, being granted, to warrant their being committed for a contempt on breach? *See Attorney-General, ex relatione*



*Mills v. Hughes*, 1 S.A.L.R., 27. *Hanson, C.J.*, and *Gwynne, J.* Equity (1867). S.A.

**74.—Special agent—Articles of association—Preferential shares.]—**“But directors are special agents—at least that is the current opinion—and can only do things which the company has authorised. They are not general agents, but simply special agents who have their power expressly vested and defined.” *Per Gwynne, J.* (arg.), in *Burraiving Copper M. Co. Ltd. v. Harvey*, 9 S.A.L.R., 14, at p. 16 (1875).

S.A.

**75.—Companies Act 1864—New Issue—Special resolution—Notice—Acquiescence—Liquidators' call—Object of call.]—**A person dealing with the directors of a company in a matter in which they are empowered by the articles of association to bind the company, if authorised by a special resolution so to do, is not bound to inquire whether all the prescribed preliminaries to the passing of such resolution have been performed, if the copy of the resolution has been recorded with the Registrar, as required by sec. 51 of the *Companies Act 1864*. The articles of association of a company empowered the directors to increase the capital of the company by the issue of new shares, if authorised so to do by special resolution passed at two meetings of the shareholders, of which at least seven days' notice should be given by advertisement in one daily and one weekly paper, and by circular addressed to each of the shareholders. A special resolution was duly recorded under sec. 51 of the *Companies Act 1864*, authorising the directors to issue 9,000 shares, 66 of which were allotted to the defendant, in accordance with his application. The notice of the first meeting at which the resolution was passed was not published in any weekly paper until less than seven days before such meeting was held. Shortly afterwards the company went into voluntary liquidation, and the liquidator made a call of 2s. 6d. per share, and claimed £8 5s. in respect of the above-mentioned 66 shares. At the trial in the Local Court of Adelaide no evidence was given of the object for which the call was made. *Held*, that, as between the allottee of the shares and the company, the meeting had been duly convened and the shares duly issued, and that a liquidator under a voluntary liquidation is not bound to show the object for which a call is made. *Telegraph Prospecting G.M. Co. Ltd. v.*

*Solomon*, 10 S.A.L.R., 68. *Hanson, C.J.*, *Stone* and *Gwynne, JJ.* Common Law (1876). S.A.

**76.—Company—Injunction against directors—Costs of motion to dissolve.]—***See PRACTICE*, 196.

## VI.—INCORPORATION.

*See COMPANY (ARTICLES OF ASSOCIATION, MEMORANDUM OF ASSOCIATION, PROSPECTUS); PARTNERSHIP; PRACTICE.*

**77.—Liability for debts incurred before incorporation.]—**A company was formed under the *Mining Partnerships Act* (No. 109), under the style of the “Minerva Mining Company, Costerfield, Limited.” After the passing of the Act No. 228, it was registered under the latter Act under the style of the “Minerva Mining Company, Costerfield, Registered.” *Held*, that the registered company, as such, was not liable for the debts of the limited company, and that the registration under the Act No. 228 did not affect the remedies which creditors possessed before such registration. *Irving v. Minerva G.M. Co. Regd.*, 3 W.W. & A'B. (L.), 78. Banco (1866).

**78.—Company—Invalid incorporation—Estoppel—Director.]—**The liquidator of a no-liability company which, at the time of its registration, had not 5 per cent. of its capital paid up, either in money or money's worth, sued N., a director of the company, for moneys received by him to the use of the company. N. was also the grantee of a bill of sale given by the company, which contained a recital that the company was incorporated. *Held*, that N. was not estopped from objecting that the company was unincorporated. *Thomas v. Nicholson*, 16 V.L.R., 861. F.C., *Williams, Webb and Hodges, JJ.* (reversing *Higinbotham, C.J.*), (1890). V.

**79.—Mines Act 1890 (No. 1120), secs. 49, 50—“Elective body corporate”—What is not.]—**A company which has been registered under the *Companies Statute 1864* (No. 190), though formed for mining purposes, is not a “person” or an “elective body corporate” within the meaning of secs. 49 and 50 of the *Mines Act 1890* (No. 1120). *Moe Coal M. Co. Ltd. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C., *Madden, C.J.*, *Holroyd and Hodges, JJ.* (1894). V.

**80.—Mines Act 1890 (No. 1120), secs. 49, 50—“Elective body corporate”—Meaning of.]—**An



"elective body corporate" is a corporation created by registration under any Act relating to the liability of mining partnerships, associations or companies, or the shareholders thereof, or under that part of the *Companies Act 1890* (No. 1074), which relates exclusively to mining companies or partnerships. *Moe Coal M. Co. Ltd. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C., *Madden, C.J., Holroyd and Hodges, J.J.* (1894).

**81.—Company—Illegal—Fraud—Registration of company—Companies Act (37 Vic. No. 9), sec. 3.]**—A company that is by positive law illegal, but not morally so, can compel a trustee to hand over money which he holds as a trustee on behalf of the company, and *a fortiori* where he has been guilty of fraud. The statement of claim set out that the plaintiffs, twenty-one in number, formed a company, which was never registered, for the purpose of gold mining, and employed the defendant on his suggestion as their agent, to secure suitable property for that purpose. He wrote to one of them that he had purchased certain property from S. for the sum of £2,000 enclosing a receipt signed by S. for £18 10s. on account of this purchase. The defendant received a large number of fully paid up shares in the company in consideration of his services as agent, and also as payment for certain land he had taken up adjoining the property purchased from S. Some time afterwards the plaintiffs ascertained that only £1,500 had been paid by the defendant to S., and this suit was instituted to recover the sum of £500. The defendant demurred to the statement of claim on the ground that the plaintiffs, not being a registered company, as required by the *Companies Act*, sec. 3, were an illegal association. *Held*, that on the facts set out in the statement of claim, and admitted by the demurrer, the plaintiffs could recover the sum of £500 fraudulently obtained from them by the defendant. *Waller v. Gipps*, 6 N.S.W.L.R. (E.), 40. *Manning, J.* (1885). (Reversed by F.C.—*see infra*). N.S.W.

**82.—Company—Illegal—Registration—Companies Act (37 Vic. No. 9), sec. 3.]**—A company that is by law illegal has no *locus standi* in Court, and cannot sue in respect of any cause of action. For facts *see supra*. *Waller v. Gipps*, 6 N.S.W.L.R. (E.), 123. *Martin, C.J., Faucett and Innes, J.J.* (reversing *Manning, J.*), (1885). N.S.W.

**83.—Company—Proof of incorporation—Onus**

**of proof—Retainer of solicitor—Companies Act (37 Vic. No. 19), secs. 17, 68.]**—Where defendants sued as a company have carried on business and held themselves out as a limited company, that is *prima facie* evidence that they are a company limited under the *Companies Act*, and the onus lies on them of proving the contrary. The retainer of a solicitor by a trading company need not, by 37 Vic. No. 19, sec. 68 (3), be under seal. *Gale v. Wingello Coal M. Co. Ltd.*, 11 N.S.W.L.R. (L.), 79. *Windeyer and Foster, J.J.* (1890). N.S.W.

**84.—Company—Proof of incorporation—Larceny of ore.]—See CRIMINAL LAW.**

## VII.—MANAGER.

*See* COMPANY (DIRECTORS, SEAL); EMPLOYER AND EMPLOYEE; NEGLIGENCE; PRACTICE; TRIBUTE.

**85.—Appointment of.]**—The appointment of manager to a company, under the Act No. 228, is a contract for service, and need not be under the corporate seal. *Royal Standard G.M. Co. Regd. v. Wood*, 3 W.W. & A'B. (L.), 85. Banco (1866).

**86.—Evidence—Act No. 228, sec. 7—Agency.]**—By the Act No. 228, sec. 7, the manager of a company may make contracts for goods and work on behalf of the company to an amount not exceeding fifty pounds. H. was the registered manager of the M. company. He ordered goods at different times from J. The goods were delivered to H. and afterwards seen on the company's works. J. sued the company for the price of the goods. *Held*, that there was no evidence of agency so as to charge the company. "The goods were delivered to H. and were afterwards seen on the company's premises. There is nothing to show how they got there. Had they been sent direct to the company the case would have been different. The fact that H. was at one time manager for the company was no evidence that he was manager when the goods were ordered." —*Per Stawell, C.J. Maxwell's Reef Co. v. Irving*, 3 A.J.R., 26. Banco (1872). V.

**87.—Credit—Responsibility of manager—Goods sold and delivered.]**—R., a manager of a co-operative mining company unregistered, ordered and obtained goods from C. for the company. C. was one of the shareholders. C. sued R. in the Police Court for goods sold and delivered, and the Court made an order in favour

of *C. Held*, on motion for prohibition, that the order was wrong and that *R.* was not answerable, as credit had not been given to him but to the company. Order absolute for prohibition. *Reg. v. Shuler, ex parte Rylands*, 3 A.J.R., 46. Banco (1872). V.

88.—Regulation of Mines Statute 1873 (No. 480), secs. 2, 5, 6 — Rules — Publication.]—The word "Manager" in Act No. 480, sec. 2, relating to an incorporated company, means the legal manager. If he publish the rules as provided in sec. 6, and enforce them as far as he can, he is not answerable for their non-observance, and if he has no means of enforcing them, he cannot be blamed for not enforcing them. The rules should be posted in some conspicuous place in connection with the mine; posting them at the office away from the mine would not be sufficient. *Curthoys v. Kilbride*, 2 V.L.R. (L.), 265. Banco (1876). V.

89.—Office—Act No. 228.]—A company which has taken no steps to wind up, but has left the name of its manager and the description of its office to stand on the register, cannot be heard to say that the first was not its officer, or the second its office. *Colonial Bank v. Willan*, L.R. 5 P.C., 417; 43 L.J.P.C., 39; 30 L.T., 237; 22 W.R., 516; 5 A.J.R., 53. J.C., *Sir James Colville, Sir Barnes Peacock, Sir Montague Smith, and Sir R. P. Collier* (1874). V.

90.—Unincorporated company — Act No. 324, sec. 9—Manager—Agent—Contract.]—A member of an unincorporated mining company who did not assent to the appointment of a manager, is not bound by a contract made by the manager on behalf of the partnership, by Act No. 324, sec. 9. He is not the agent of the dissenting partner for this purpose, although he may be the agent of all the others. *Renwick v. Barkas*, 2 V.L.R. (L.), 269. Banco (1876). V.

91.—Contract of manager—Act No. 409, secs. 21, 40.]—The manager of a mining company, under Act No. 409, sec. 21, has only authority to contract to the extent of £50, and for any contract in excess of that amount an express authority is required. *McIver v. The Duke Co.*, 5 V.L.R. (L.), 454. Banco (1879). V.

92.—Manager of mining company—Registered holder of mining tenement—Power to deal with it.]—The registered holder of a mining claim, although only a trustee for others, can, without

the authority of his *cestuis-que-trustent*, give a valid consent to a portion of such claim being included in a mining lease, and the consent of the beneficiaries is not necessary. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 37. F.C., *Stawell, C.J., Higinbotham and Williams, JJ.* (affirming *Molesworth, J.*), (1883). V.

93.—Mining Statute 1865 (No. 291), secs 6, 14 — Manager of mining company — Registered holder of mining tenement—Power to deal with —Conflict between claim-holder and lessee.]—*S.*, the manager of the plaintiff mining company, was the registered holder of a mining tenement as trustee for the company, and upon conflicting applications by himself and *A.*, the manager of the defendant company, for leases of adjoining lands for their respective companies, consented that a portion of the land comprised in the mining tenement should be given up and included in the lease to be issued to the defendant company. *Held*, upon appeal (affirming the decision of *Molesworth, J.*), that *S.*, as registered holder of the claim, had power to consent to give it up; but that if the authority of the plaintiff company was necessary, the facts showed such authority. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 37; 4 A.L.T., 164. F.C., *Stawell, C.J., Higinbotham and Williams, JJ.* (1883). V.

94.—Lease granted to manager of company—Death of manager before execution.]—See LEASE.

95.—Company — Action by promoter against legal manager—Mining Partnership Act (24 Vic. No. 21).]—In an action brought by one of the "promoters" of a gold mining company, registered under the *Limited Liability of Mining Partnership Act* (24 Vic. No. 21), against the "legal manager" of the company for a sum of money and certain shares to which he claimed to be entitled "as such promoter," and claiming a writ of *mandamus* to compel the company to register him as a shareholder in respect of the said shares, in their register of shareholders: *Held*, on demurrer, that the declaration was bad, as not showing how and in what manner the plaintiff acquired the rights he claimed as "promoter." *Held*, that if it was stipulated in the prospectus, under which the company was formed, that the plaintiff should have the rights claimed, the company, when formed, would be

bound by the stipulation. *Held*, also, that such rights would be enforceable against the company sued in the name of their manager in an action like the present, and as incidental thereto a *mandamus* might be claimed. *Held*, also, that the 3rd section of Act 24 Vic. No. 21, is not controlled or restricted by the provision in the 4th section. *Hoskins v. Davis*, 11 N.S.W.S.C.R. (L.), 305. *Stephen, C.J., Hargrave and Cheeke, JJ.* (1872). N.S.W.

96.—Company—24 Vic. No. 21—Registration—Appointment of manager—Right to sue company—Admission of manager—Memorial.]—Before a person styling himself “manager” of a company can be sued or made liable under the *Limited Mining Partnership Act* (24 Vic. No. 21), for the debts of such company, the plaintiff must show that the company has been duly registered, and the manager appointed in accordance with the provisions of the said Act. Failing such proof the company is not bound by any admissions of the so-called manager. At the trial, a copy of the memorial of the company, lodged in accordance with the 8th section of the Act, in the Supreme Court, was produced. *Held*, that such copy of the memorial was evidence neither of the registration of the company, nor of the appointment of the manager. *McNeill v. Sandeman*, 12 N.S.W.S.C.R. (L.), 51. *Martin, C.J., Hargrave and Cheeke, JJ.* (1873).

N.S.W.

97.—Mining Company—Manager—Occupier—Municipal roll—Municipalities Act 1876.]—See MUNICIPALITIES.

### VIII.—MEETINGS.

See COMPANY (ADVERTISEMENT, ARTICLES OF ASSOCIATION, CALLS, DIRECTORS, MEMORANDUM OF ASSOCIATION, ULTRA VIRES, VOTES).

98.—Extraordinary meeting—Increase of capital.]—The notice of an extraordinary meeting under sec. 23, Act No. 228, means fourteen days at least; it may be longer. The provisions of sec. 24, Act No. 228, are directory only, not mandatory; an indictment might be preferred against the manager, but non-compliance with the provisions of that section does not avoid the increase of capital. *Robin Hood G.M. Co. Regd. v. Stavelly*, 4 W.W. & A'B. (M.), 26. *Molesworth, J.* (1867). V.

99.—Calls—Rules—Meetings.]—Where the de-

fendant was present at and chairman of a meeting, and signed the minutes as chairman, and afterwards, when himself a director, acted at meetings of the directors: *Held*, that he was precluded from disputing the facts which he had thus admitted, and would not be allowed to take advantage of the fact that those meetings had not been called in accordance with the rules. *Solomon v. Collingwood Q.M. Co. Regd.*, 4 W.W. & A'B. (L.), 130. *Banco* (1867). V.

100.]—Where some of the rules of a company registered under Act No. 228 are bad, that circumstance will not vitiate all the rest. *Ibid.*

101.]—Where a rule required that notice of call should be published in a newspaper: *Held*, that notice by circular was a fatal non-compliance with the rules. *Ibid.*

102.—Convening meetings.]—An extraordinary meeting under Act No. 228 to have authority to increase capital must have been duly convened. *A1 G.M. Co. v. Stackpoole*, 4 A.J.R., 170. *Banco* (1873). V.

103.—Notice.]—If, by the Act under which a company is formed, or by the rules of the company, no special mode of calling a meeting is provided, it is necessary that each shareholder should receive notice; merely advertising is not sufficient. *Charlton v. Barkly Reef G.M. Co.*, 3 V.L.R. (L.), 101. *Banco* (1877). V.

104.—Votes—Directors—Power to rescind.]—A company provided by its rules that if the manager refused or neglected for four days after a requisition had been delivered requiring him to call a meeting, a majority of the requisitionists could call a meeting. *Held*, that the requisitionists could only call a meeting after the lapse of the four days. It also provided by a further rule that no shareholder should be entitled to vote unless all calls and expenses due by him should be paid. *Held*, that the effect of the rule was not to make the vote of such a person bad, unless it was objected to upon being tendered. When directors are elected by a resolution, a power to rescind resolutions does not of itself include a power to rescind such an election. *Aberfeldie G.M. Co. v. Walters*, 2 V.L.R. (E.), 119. *Molesworth, J.* (1876). V.

105.—General meeting—Notice to shareholder.]—Where a general meeting of a company is properly convened in accordance with the stat-

utory provisions relating to the company, a shareholder has legal notice of the meeting, and stands in the same position as if fully cognizant of what was intended to be done thereat without actual knowledge having been brought home to him. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 98. F.C., *Stawell, C.J.*, and *Holroyd, J.* (1883). V.

106.—Distinction between general, special and extraordinary meetings of company.—See per *Holroyd, J.*, in *Sadler v. Spread Eagle Co.*, 19 V.L.R. 482 (1893). V.

107.—General meeting—"Seven days' notice."—The articles of association of a company required that every general meeting should be convened by the manager by a seven days' notice inserted twice in one newspaper published at B. Held, that both insertions must take place at least seven days before the meeting. *Dalrymple v. Prince of Wales and Bonshaw United Co.*, 16 A.L.T., 168. F.C., *Williams, Holroyd and Hood, J.J.* (reversing *Madden, C.J.*), (1895). V.

108.—Company—Companies Act 1874 (37 Vic. No. 19), sec. 83—Acts Shortening Act 1858 (22 Vic. No. 12), sec. 11—Meeting—Computation of time—Interval of not less than fourteen days.—By sec. 83 of the *Companies Act*, a special resolution must be confirmed "at a subsequent general meeting . . . held at an interval of not less than fourteen days . . . from the date of the meeting at which such resolution was first passed." A special resolution was first passed at a meeting held on February 18th, 1892, and was confirmed at a subsequent general meeting held on March 3rd, 1892. Held, that sec. 11 of the *Acts Shortening Act* applied; and that the meeting of March 3rd was held at an interval of not less than fourteen days from the meeting of February 18th. In *re Katoomba Coal and Shale Co. Ltd.*, *North's Case*, 13 N.S.W.L.R. (E.), 70. *Owen, J.* (1892). N.S.W.

109.—Company—Sufficiency of notice—Resolution.—A notice convening a meeting at which a resolution was passed that it had been proved to its satisfaction that the company could not by reason of its liabilities continue its business, and that it should therefore be wound up voluntarily, stated that the business of the meeting would be to consider whether the company, by reason of its liabilities, could continue its business, when it would be proposed that the company should

be wound up voluntarily. Held, that the notice sufficiently stated the intention to propose the resolution which was afterwards passed. *Inglewood Mining Venture Ltd. v. Price*, 6 S.A.L.R., 2. *Hanson, C.J.*, *Gwynne and Wearing, J.J.* Common Law (1872). S.A.

#### IX.—MEMORANDUM OF ASSOCIATION.

See COMPANY (ARTICLES OF ASSOCIATION, DIRECTORS, INCORPORATION, OBJECTS, ULTRA VIRES).

110.—Execution of deed.]—The Act No. 56, sec. 3, provided that "the instrument of association shall be subscribed by each member thereof." In an action for calls made in accordance with the instrument of association it was held that as the defendant had never executed the instrument he was not liable for sums due under it. *Farran v. Bowman*, 1 W. & W. (L.), 150. Banco (1862). V.

111.—Execution of deed.]—A person who had applied in writing for and was the holder of shares in a mining company, was rightly deemed a shareholder of the shares subscribed for, "within the meaning of the Act 18 Vic. No. 42," although he had not subscribed the instrument of association of the company. *Melville v. Higgins*, 1 W. & W. (L.), 306. Banco (1862). V.

112.—Deed—Prospectus.]—There may be a variance between the deed of association of a mining company and the prospectus of the company, and yet the deed may be deemed substantially to bear out the prospectus. *Bowman v. Homan*, 1 W. & W. (L.), 390. Banco (1862). V.

113.—Execution of deed.]—Under the *Mining Partnerships Act* (No. 109), a person might be the holder of shares in a company under the Act without having executed the instrument of association. *Bowman v. Farran*, 1 W. & W. (L.), 150; *Melville v. Higgins*, 1 W. & W. (L.), 306, distinguished as under different Acts. *Maconochie v. Woods*, 2 W. & W. (L.), 250. Banco (1863). V.

114.—Evidence of membership.]—The execution of an instrument of association antedated, and containing a recital that the parties signing it had agreed to form a partnership, is evidence of an admission that the fact recited was true. *National Bank v. Brock*, 1 W.W. & A'B. (L.), 208. Banco (1864). V.

**115. — Company — Companies Act 1864 — Memorandum of association—Articles— Limited liability — Power of directors to make call — Transfer.]—**The articles of association of a company of limited liability, registered under the *Companies Act 1864*, contained, amongst others, the following provisions :—(1.) A power for the directors to make calls, not exceeding, at any one time, 2s. 6d. per share, provided that, in the event of a larger sum being required for the purpose of working the mines on the property of the company, over and above the call which the directors were thereby authorised to make on the property of the company, it should be lawful for the shareholders, at any general or special general meeting, to make such further call or calls as the majority of shareholders at such meeting might think proper. (2.) A power to the directors to refuse to register any transfer, if, at the time of the same being lodged for registration, the transferee were indebted to the company. There was nothing in the memorandum of association of the company to warrant the proviso above mentioned. *Held*, that the proviso was *ultra vires*, and a call made pursuant thereto did not constitute a debt, so as to justify the directors in refusing to register a transfer. *In re Devon Consols M. Co. Ltd., ex parte Wood*, 12 S.A.L.R., 167. *Gwynne, J.* Equity. (1878). S.A.

**116.—Company — Mining Partnership — Deed of settlement not signed—Director—Estoppel—Winding-up.]—**See PARTNERSHIP.

#### X.—MINUTE-BOOK.

**117.—Mining Companies Act 1871 (No. 409), sec. 38—"Book of account."]**—A minute-book containing minutes of the proceedings of the directors of a mining company, and including the accounts of the company as presented to them and passed for payment, is not a "book of account," open to the inspection of a shareholder under sec. 38 of the *Mining Companies Act 1871* (No. 409). *James v. Thomson*, 10 V.L.R. (L.), 125; 6 A.L.T., 12. *Williams and Holroyd, JJ.* (1884). V.

**118.—Resolution of directors of company—Parol evidence.]—**Evidence may be given of a resolution passed by a board of directors of a company registered under the *Mining Companies Act 1871* (No. 409), although it does not appear

upon the face of the company's minute-book that such a resolution was passed, even where the rules of the company provide for the keeping of a minute-book by the manager, which is to be evidence of what occurs before the directors. *Clarke v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 976. *Webb, J.* (1888). V.

**119. — Companies Act 1864 — Sufficiency of notice—Resolution.]—**Under the *Companies Act 1864*, the minute-book is *prima facie* evidence not only that any notice mentioned therein has been duly sent, but that such notice contained the requisite information, and such notice need not state resolutions to be proposed in the very words of the Act, but will be sufficient if it substantially set forth the nature of the business to be transacted and the resolutions to be proposed. *Inglewood Mining Venture Ltd. v. Price*, 6 S.A.L.R., 2. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1872). S.A.

#### XI.—NAME.

See COMPANY (INCORPORATION); PRACTICE.

**120.—Corporate name.]—**A company purporting to be registered under the Act No. 228, sued a shareholder for calls in the name of "The Guiding Star Gold Mining Company, Registered." On the hearing a certificate of incorporation was produced in which the company was designated "The Guiding Star Quartz Mining Company, Registered." *Held*, that the variance in the name was a fatal objection, and that the complainant should have been non-suited. *Iredale v. Guiding Star G.M. Co. Regd.*, 4 W.W. & A'B. (L.), 198. *Banco* (1867). V.

**121.—Mining Companies Act 1871 (No. 409), secs. 9, 118 — Style of company.]—**It is not necessary for a company incorporated under the *Mining Companies Act 1871* (No. 409), to have the word "Limited" added to its name. *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth, J.* (1882). V.

#### XII.—NO-LIABILITY COMPANY.

See COMPANY (DIRECTORS, MISCELLANEOUS, SHARES, ULTRA VIRES, WINDING-UP); PRIVATE PROPERTY.

**122.—Mining Companies Act 1871 (No. 409), secs. 6, 7, 8, 10, 116, 118—No-liability company — Registration — Incorporation — Conclusive**

evidence — Non-payment of 5 per cent. of capital at time of registration.]—Although by the *Mining Companies Act 1871* (No. 409), sec. 10, a certificate of the Registrar-General is conclusive evidence of registration, and by secs. 6, 7 and 8, registration is conclusive evidence of incorporation; yet a no-liability company will, under sec. 118, be held unincorporated if 5 per cent. of its capital was not paid up at the time of registration. *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4; 4 A.L.T., 135. *Molenoorth, J.* (1883). V.

123.—No-liability company—Action for trespass by—Non-payment of 5 per cent. of capital at time of registration.]—A no-liability company under the *Mining Companies Act 1871* (No. 409), having an assignment of a lease under the *Mining Statute 1865* (No. 291), suing for trespass or injury upon the leased land, may be defeated by the defendant showing that one-fifth of its capital was not paid up at the time of its registration. *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4; 4 A.L.T., 135. *Molenoorth, J.* (1883). V.

124.—*Mining Companies Act 1871* (No. 409), secs. 10, 118—No-liability company—Certificate of incorporation—Essentials to registration.]—The Court will go behind the certificate of incorporation of a no-liability company to see whether 5 per cent. of its subscribed capital was paid up previous to its incorporation, in compliance with sec. 118 of the *Mining Companies Act 1871* (No. 409). *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4, followed. *Britannia United Co. v. Victoria United G.M. Co.*, 16 V.L.R., 533; 12 A.L.T., 46. *Hodges, J.* (1890). V.

125.—*Mining Companies Act 1871* (No. 409), sec. 118—No-liability company—Essentials to registration—Subscribed capital.]—The 5 per cent. of the subscribed capital which must be paid up prior to the registration of a no-liability company may be paid either in money or money's worth, and the machinery plants of two companies which amalgamate taken over by the amalgamated company will be regarded as part of its subscribed capital within the meaning of sec. 118 of the *Mining Companies Act 1871* (No. 409). *Britannia United Co. v. Victoria United G.M. Co.*, 16 V.L.R., 533; 12 A.L.T., 46. *Hodges, J.* (1890). V.

126.—No-liability company—Registration—

Incorporation—Non-payment of 5 per cent. of capital at time of registration.]—A no-liability company will be held unincorporated if 5 per cent. of its capital, in money or money's worth, has not been paid up at the time of registration. *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4, followed. *Thomas v. Nicholson*, 16 V.L.R., 861. F.C., *Williams, Webb and Hodges, JJ.* (1890). V.

127.—Security for costs—No-liability company—Action by liquidator.]—A liquidator of a no-liability company, who is suing for the purpose of getting in the assets of the company, will not be ordered to give security for the costs of the action. *Mackie v. Clough*, 17 V.L.R., 201; 12 A.L.T., 183. *Hood, J.* (1891). V.

128.—*Companies Act 1890* (No. 1074), sec. 236 — No-liability company — Directors — Dividend payable out of capital—Liability of directors.]—The directors of a no-liability company having notice of a claim against the company, sold the mining machinery which formed the only asset of the company available for payment of debts, and distributed the proceeds in the form of dividends amongst the shareholders. *Held*, that the directors were liable both under the *Companies Act 1890* (No. 1074), sec. 236, and under the general law, to refund the amount thereof, or so much thereof as might be sufficient to satisfy the claims of the creditors to the liquidator suing on behalf of the creditors, and that, notwithstanding that the directors had not been prosecuted under that section. *Mackie v. Clough*, 17 V.L.R., 493; 13 A.L.T., 122. *Webb, J.* (1891). V.

129.—*Companies Act 1890* (No. 1074), Part II., secs. 252 — No-liability company — Petition by company for winding up—Service of notice on company seven days previous.]—A no-liability company presenting a petition for its own winding up to a judge of a Court of Mines, under sec. 252 of the *Companies Act 1890* (No. 1074), Part II. need not give itself the seven days' notice required by that section. *In re Hans G.M. Co.*, 2 A.L.R., 210. *Judge Gaunt* (1896). V.

130.—No-liability company—44 Vic. No. 23, secs. 7, 8 — Calls — Payments — Forfeiture of shares.]—Where a call has been made on shares in a no-liability company, and such call is unpaid at the expiration of twenty-eight days after the day for its payment, the shares become absolutely

forfeited by virtue of the provisions of sec. 8 of 44 Vic. No. 23, and the directors have no power to accept payment of such call and annul the forfeiture. *Per Darley, C.J.*, at p. 298:—"It is clearly for the benefit of the company not to have a number of shares on the list belonging to shareholders who cannot pay calls on them, and it is for that reason that the Act provides that on non-payment of the calls the shares shall be forfeited and sold." *Brown's Creek G.M. Co. No Liability v. Hatton*, 12 N.S.W.L.R. (L.), 293. *Darley, C.J.*, and *Windeyer, J.* (1891). N.S.W.

131.—No-liability company—44 Vic. No. 23, secs. 1, 2, 6, 9, 16—"Mining purposes"—Power of company under the Act to sell its mine—Directors authorised by the company's rules to sell—Contract to give purchaser option to rescind within four months *intra vires* the company, but *ultra vires* the directors.]—A company registered under the *No Liability Mining Companies Act* can take power to itself by its rules to sell its mine, such a sale being a "mining purpose" within the meaning of the Act, and without any rule to that effect a company under the Act has by implication power to sell its mine and assets with a view to dissolution under sec. 9 of the Act. A company cannot be registered under the *No Liability Companies Act* in New South Wales to work mines outside the colony. A no-liability mining company by its registered rules took power to sell (*inter alia*), its mine, and all the powers of the company were, by a subsequent rule, given as special powers to the directors. An agreement for a sale of the mine was come to by the directors on behalf of the company, but leave was reserved in the agreement to the purchaser to cancel the agreement within four months in terms of forfeiting the first instalment of the purchase money. Under the rules of the company the majority of the shareholders at a properly convened meeting had power to bind the minority. *Held*, that such a sale was within the powers of the company acting by a majority of shareholders; but whether it would not be *ultra vires* the directors on the principle of *Oceanic S.N. Co. v. Sutherland*, 16 Ch. D., 236, *quære*. *Hearn v. Central Broken Hill S.M. Co. No Liability*, 16 N.S.W.L.R. (E.), 87. *Owen, J.* (1895). N.S.W.

132.—No-liability company—Power to dispose of land.]—*Per Owen, J.*, at p. 94:—

"*Prima facie* every corporation having power to hold land has power to dispose of such land unless such power is expressly or impliedly taken away. There is nothing in the *No Liability Companies Act* expressly taking away this power, and before the Court can hold that such power is impliedly taken away, it must see very clearly that such an implication necessarily arises from the wording of the Act or the peculiar position of a no-liability company." *Hearn v. Central Broken Hill S.M. Co.*, 16 N.S.W.L.R. (E.), 87 (1895). N.S.W.

133.—No-liability company—Security for costs.]—*See PRACTICE*, 115, 116, 117.

### XIII.—OBJECTS.

*See COMPANY (ARTICLES OF ASSOCIATION, DIRECTORS, MEMORANDUM OF ASSOCIATION, ULTRA VIRES).*

134.—Private and public.]—With regard to companies constituted by Act of Parliament and companies constituted by deed of settlement, this distinction exists, that with regard to the former there is an element of public interest which forbids such companies to exceed their powers, even though all shareholders agree, whereas the latter may exceed their powers (change the nature of their business for instance), provided all agree. *Lee v. Robertson*, 1 W. & W. (E.), 386. *Chapman, J.* (1863). V.

135.]—It is quite competent to any person desirous of carrying a point lawfully within the functions of a company, to purchase shares in the market in order to increase the number of votes. *Ibid*. V.

136.]—A dissentient and outvoted minority cannot invoke the aid of a Court of Equity to disturb the decision of a majority on a question which they are competent to decide; but where they are not so competent, one dissentient shareholder may obtain an injunction in a suit on behalf of himself and all other shareholders, except the managing body. *Ibid*. V.

137.—Prospectus—Variance.]—*See COMPANY*, XV.

138.—Appeal from Local Court (S.A.)—Magistrate's ruling.]—*See PRACTICE*, 86.

### XIV.—PROMOTERS.

*See COMPANY (PROSPECTUS).*



**139. — Promoters' liability — Free shares — Prospectus—Misrepresentation — Material facts — Fraud—Ambiguity.]**—In an action of deceit against the promoters of a company, the plaintiff must prove actual fraud, and that such fraud was an inducing cause to the contract, and actual damage. It is not sufficient to show that the prospectus was silent as to the fact that some of the promoters received fully paid-up shares, as a remuneration for their services and the use of their names, from another of the promoters, who was entitled to such fully paid-up shares, as stated in the prospectus. *Ingham v. Hardy*, 19 S.A.L.R., 64 *Way, C.J.* (1885). S.A.

**140.—Promoter—Right to take up shares in company.]**—A promoter of a company has a right to take up shares in the company he is promoting. *In re Mount James Consolidated S.M. Co. Ltd., In re Hayward, ex parte Allen*, 23 S.A.L.R., 127, 131. *Boucalt, J.* (1889). S.A.

**141.—Promoters—"Syndicate"—Partnership —Mineral lease.]**—See PARTNERSHIP.

#### XV.—PROSPECTUS.

See COMPANY (DIRECTORS, MEMORANDUM OF ASSOCIATION, PROMOTERS, SHARES).

**142.—Contract—Company—Prospectus — Misrepresentation.]**—The plaintiff, on the faith of a representation in a prospectus put forward by the provisional directors of a company that the company would start with a credit of £4,000, took 500 shares in the company, paying £50 for the shares. The company started with a credit of only £900. The plaintiff brought an action in the District Court against the directors to recover the £50, and was non-suited. *Held, per Windeyer and Foster, J.J.*, on appeal, that he was entitled to recover the money so paid. *Held, per Stephen, J.*, that there should be a new trial in order that the damages might be assessed. *De Kantzow v. Inglis*, 10 N.S.W.L.R. (L.), 297 (1889). N.S.W.

**143.—Fraud—Prospectus.]**—The directors of a company for the working of a bismuth and copper mine had published a prospectus in which they stated that by a process recently discovered and patented, and which was the exclusive property of the company, the bismuth could be separated from the copper at an expense below that which would be incurred in the process

theretofore in use. The plaintiff, on the faith of this prospectus, became a shareholder in the company, and it subsequently appeared that the process was of no utility. On an action brought by the plaintiff against the defendant for fraudulently publishing the prospectus, it appeared that the directors, at the time the prospectus was published, fully believed in the truth of the statements therein, and published it with no fraudulent intention. *Held*, that to make directors liable for having published a false prospectus, they must have done it knowing it to be untrue, or with a fraudulent intention. *Wright v. Darwent*, 3 S.A.L.R., 121. *Gwynne and Wearing, J.J.* Common Law (1869). S.A.

**144.—Fraud —Prospectus — Evidence.]**—Evidence necessary to support such a case of fraud. See *Wright v. Darwent*, 3 S.A.L.R., 121. *Per Wearing, J.*, at p. 129. S.A.

**145. — Companies Act 1864 — Prospectus — Articles of association — Variance.]**—A person placed on the register of a company pursuant to an application made on the faith of a prospectus, is not liable to such company for calls subsequently made if there are material discrepancies between the objects set out in such prospectus, and in the articles of association, even though such person may not have taken any steps on being aware of such discrepancies to remove his name from the register. *Tumbling Waters Freehold Co. v. Juriet*, 8 S.A.L.R., 131. *Hanson, C.J.*, and *Wearing, J.* Common Law (1874). S.A.

**146. — Companies Act 1864 — Prospectus — Articles of association — Variance — Laches.]**—A prospectus set out that "the objects for which it is proposed to form this company are to purchase from the owner thereof a freehold section, No. 614, in the Hundred of Cavenagh, Northern Territory . . . for the purposes of gold mining, and for such other purposes as are set out in the memorandum and articles of association, to be adopted as hereinafter mentioned." The memorandum of association set out in addition that the objects of the company were "the prospecting, digging, &c., for gold and other minerals in the said Northern Territory; the acquisition by lease or purchase or otherwise of all lands in the said Northern Territory whereon or wherein such discoveries may be made; the working of the said section, and of any claims, mines, or mineral property in the



said Northern Territory, which may be acquired by the said company." On the faith of the above prospectus, the defendant applied for shares in the proposed company, and on the formation, received notice of allotment and subsequent calls, none of which were paid by him, but took no proceedings to remove his name from the register. The Court *held*, on an action for allotment and directors' calls, that the defendant had never agreed to join such company as that constituted by the memorandum of association, and was entitled to a verdict. But the primary judge subsequently refused to order his name to be removed from the register of shareholders, under the above circumstances, the defendant having, from the first, been aware of the variance between the prospectus and the articles of association, and taken no steps in the matter until the failure of the company. *Tumbling Waters Freehold Co. v. Juriet*, 8 S.A.L.R., 131. *Hanson, C.J., and Wearing, J.* (1874).

S.A.

147.—*Companies Act 1864*—Allotment call—Promoters — Registration — Memorandum of association — Articles of association — Prospectus.]—Secs. 6, 12, and 13 of the *Companies Act 1864*, provide that the memorandum of association shall contain the conditions, and the articles the regulations of the company; and sec. 15 makes the articles binding on the members, as if each member had signed them, and as if a covenant were therein contained on the part of each member to conform to the regulations contained in the articles, subject to the provisions of the Act; and that all moneys payable by any member of the company, in pursuance of the conditions and regulations of the company, or any of them, shall be deemed to be a specialty debt due from the member to the company. Sec. 22 defines a member of the company to be every person who agrees to become a member, and whose name appears upon the register. The prospectus of an intended company provided that 5s. a share should be payable by every applicant on application, and 5s. a share on allotment; and that as soon as possible after allotment a meeting should be held to settle the memorandum and articles of association. The defendant applied in writing to the promoters of the company for 100 shares, to be allotted to him, and, by such application, agreed to be bound by the resolutions passed at the meeting to be held as before mentioned, and authorised

the promoters to place his name on the register of shareholders of the company. A meeting was accordingly held, pursuant to the prospectus, and the memorandum and articles were settled, and subsequently filed with the Registrar of Companies. They contained a provision that £1 per share should be payable by each member in pursuance of the terms of the prospectus—but the prospectus itself was not deposited—and empowered the directors to forfeit all shares in respect of which the allotment call had not been paid within fourteen days after the incorporation of the company. The defendant's name was placed on the register as the owner of 100 shares. *Held*—(1.) That the defendant was a member of the company, and was liable to the company for the unpaid allotment call. (2.) That the company was duly registered. *Quere*, whether the promoters of an intended company can maintain an action for moneys payable to them, pursuant to prospectus and application issued and made before the incorporation of the company. *North Eleanor G. M. Co. Ltd. v. Coles*, 10 S.A.L.R., 38. *Stow, J.* Common Law. (1876). S.A.

#### XVI.—REGISTRATION.

148.—*Registration.*]—The Act No. 42 required persons desirous of registering a company under its provisions to give a notice containing certain particulars to the Clerk of the Court, and also a copy of the rules of the company. Where a copy of the rules only was furnished, but containing all the particulars required in the notice, it was held that two documents were unnecessary, and that the Act had been complied with. *Re Harrison, ex parte Pinnegar*, 1 W. & W. (L.), 47. Banco (1861). V.

149.—*Memorial of registration.*]—(1.) A mining partnership might have been registered under the Act No. 109 if the memorial required by the Act was "in the form" required by the Act, although it did not truthfully set forth the facts required. The official agent was the proper person to sue for contribution—under that Act—and he might recover summarily before justices (*Williams, J.*, dissenting). (2.) *Held*, by *Williams, J.*, that a memorial under the Act No. 109, not stating the capital, or the amount or number of the shares of a company accurately, was no memorial of that company. The want of a memorial was fatal, and the execution of the company's deed by a defendant did not stop

him from taking the objection. *Re Mackenzie, ex parte Clarke*, 1 W. & W. (L.), 136. *Stavell, C.J., Williams and Molesworth, J.J.* (1862). V.

**150.—Registered company—Registration.]—**Sec. 65 of the Act No. 56 required a notice, together with a copy of the rules, to be deposited with the Clerk of the Court. *Held*, that when a copy of the rules only was deposited, the company was never formed under the Act. *Re Harrison, ex parte Pinnegar*, 1 W. & W. (L.), 47 (*supra*), distinguished. In that case the person objecting was a shareholder, and although as between shareholders, after the benefits of a company formed under the Act have been participated in, each member ought to be debarred from taking advantage of his own negligence or omission, and alleging as a defence to an action for payment of calls, that he had not complied with the Act, by the provisions of which he had received the benefits of limited liability, yet as against strangers, the Act being in derogation of common law rights, should be construed strictly. *Carter v. Watson*, 1 W. & W. (L.), 222. Banco (1862). V.

**151.—Registered company—Registration.]—**Sec. 2 of 18 Vic. No. 42, was mandatory, and as sec. 6, which pointed out the mode of correcting errors, was repealed, and sec. 8 of Act No. 56 limited to companies formed under it, non-compliance with Act No. 42 vitiated the formation of a company purporting to be formed under it; and when a debt had been incurred by a partnership of which the defendants were admitted to be members, and the partners had not formed a company in compliance with the provisions of the enactment: *Held*, that the defendants could not avail themselves of its exemption, and were personally answerable for the amount of the debts. *Oriental Bank v. Casey*, 1 W. & W. (L.), 229. Banco (1862). V.

**152.—Registration.]—**If the memorial referred to in 27 Vic. No. 228, sec. 9, is not lodged with the Clerk of the Court of Mines nearest to the place of operations, or proposed operations, the omission is fatal to the registration of the company. *Wooler v. Carver*, 3 W.W. & A'B. (L.), 2. Banco (1866). See Act No. 324, sec. 2. V.

**153.—Registered company does not represent former partnership.]—**Where certain persons were registered for claims, and some time afterwards some of them, with others, formed a new

company, and registered it under the Act No. 228, sec. 9: *Held*, that the new company did not represent the persons originally registered for the claims, and could not maintain a suit for encroachment. *Warrior G.M. Co. Regd. v. Cotter*, 3 W.W. & A'B. (M.), 92. *Molesworth, J.* (1867). V.

**154.—Certificate of registration.]—**A mining company registered under the Act No. 228, or any person, may obtain from the Clerk of the Court of Mines, who is bound to give it, a certificate of the registration of the company, as often as may be desired, on payment of the fee. *Reg. v. Green*, 5 W.W. & A'B. (L.), 202. Banco (1868). V.

**155.—Evidence of registration—Estoppel—Deed of association.]—**A recital in a deed of association that the company is duly registered under the Act No. 228, does not, in a complaint for contribution by an official agent against a person who has executed the deed, estop the latter from showing that the company was not duly registered; but is only *prima facie* evidence of the registration which he may rebut. *Reeves v. Greene*, 6 W.W. & A'B. (L.), 87. Banco (1868). V.

**156.—Registration—Court nearest to place of operations.]—**Buninyong and Ballarat were both in the same mining district. A mining company carried on its operations on a claim a little nearer Buninyong than Ballarat. The Court of Mines sat at both places. The company was registered with the clerk of the Court of Mines at Ballarat, who gave a certificate of registration. *Held*, that the company was registered with the right clerk, and that the words "with the clerk of the Court of Mines nearest to the place of operations" did not mean the clerk at the Court-house of the Court of Mines which was nearest topographically to the place of operations. There was but one court for each district, and the word "court" in the section meant the court of the district, not a court held in a division of the district. The certificate is conclusive evidence that the company has been registered under the Act. *Attorney-General and Bonshaw Co. Regd. v. Prince of Wales Co. Regd.*, A.R., 25th Dec., 1868. V.

**157.—Certificate of registration—Clerk of Court of Mines.]—**A rule *nisi* for a *mandamus* was granted to compel a clerk of the Court of Mines to issue a certificate of registration of a

registered company to the official agent who had applied for it. The clerk had objected to give the certificate on the ground that the registration had been effected with a previous officer, and that there were some discrepancies between the memorial as published in the newspapers and that lodged in the office. A certificate had been issued to the company. *Reg. v. Bartrop*, 6 W.W. & A'B. (L.), 84. Banco (1869). V.

158.—Act No. 409, sec. 10—Certificate—Deputy Registrar—Act No. 213, sec. 215.]—The certificate of the incorporation of a company under Act No. 409, sec. 10, is sufficient if signed by the Deputy Registrar-General. Act No. 213, sec. 215, does not merely apply to statutes in force at the time it was passed. *Reg. v. Walter*, 5 A.J.R., 25. Banco (1874). V.

159.—37 Vic. No. 19, sec. 33—Rectification of register—Damages.]—See *Re N.S.W. and Q. Smelting and R. Co. Ltd.*, 3 N.S.W.W.N., 99. *Darley, C.J., Faucett and Innes, JJ.* (1887). N.S.W.

160.—Registration of unlimited company—Prior liabilities.]—Effect of registration under the *Companies Act 1864* on the prior liabilities of the members of an unlimited company. See *In re Karkarilla M. Co. Ltd.*, *Moyle's case*, 1 S.A.L.R., 43. *Gwynne, J.* Equity (1867). S.A.

161.—Liquidation—Transfer—Registration—Laches.]—In January, 1875, W., being the registered holder of 217 shares in a company registered under the *Companies Act 1864*, lodged with the proper officer of the company a transfer of such shares to M., which transfer the company wrongfully refused to register, and applications for calls in respect of those shares were from time to time sent to W., who took no notice of such application. W.'s name continued on the register for about four years without any steps being taken by him to have same removed, when the company being then in liquidation, W. took out a summons to have the name of M. substituted for his own on the register. *Held*, that W. had not been guilty of any laches to disentitle him to have the register so rectified. *In re Parara M. & S. Co. Ltd.*, *ex parte Wood*, 13 S.A.L.R., 117. *Gwynne, J.* Equity (1879). S.A.

162.—Liquidation—Fraud of promoters—Laches in removing name from register.]—See *In re Photographic Co. of S.A.*, 18 S.A.L.R., 13. *Boucaut, J.* (1884). S.A.

## XVII.—RESIDENCE AREA.

163.—Residence area.]—*Semble*, that an incorporated company is incompetent to hold a residence area. *Warrior G.M. Co. Regd. v. Cotter*, 3 W.W. & A'B. (M.), 95. *Molesworth, J.* (1867). V.

164.—Residence area—Transfer of, to trustee—Title.]—See RESIDENCE AREA.

## XVIII.—SEAL.

See ATTORNEY.

165.—Restitution of company's seal and papers seized under search-warrant.]—Wekey, the manager, and two others, directors of a mining company, registered under the Act No. 228, were arrested on a charge of conspiracy to defraud. On the information of Pokorney, one of the prosecutors, a search-warrant was issued and given to Walker, a detective officer, to execute. Acting under it Walker searched Wekey's premises and seized the company's papers and seal which he found there. A judge's summons was thereupon issued at the instance of the company requiring Walker, Gresson (the attorney for the prosecution), and Pokorney, to show cause why Walker should not deliver up to the company or its solicitor the seal and papers so seized. This summons was heard in Chambers by His Honour the Chief Justice, who directed the seal and all papers not actually essential to the prosecution, to be delivered up to the company forthwith. *Re Aladdin and Try Again United G.M. Co.*, 1 A.J.R., 116. *Stawell, C.J.* (1870). V.

166.—Bill or note—Indorsement—Common seal—Name—Evidence.]—A mining company can indorse a bill or note so as to pass the property to the indorsee. The indorsement may be by affixing the common seal. A difference between the name on the seal and the name of the company would not avoid the indorsement, if it were proved that the seal used was used as the seal of the company. *Bank of Victoria v. Brown*, 1 V.L.R. (L.), 49. Banco (1875). V.

167.—Mining company—Attorney—Appointment under seal.]—Where an incorporated company is complainant in a Warden's Court, it must appear either by a barrister or an attorney appointed under seal. But it is not necessary that such appointment should appear on the face of the summons. *Clarence United Co. v. Gold-*

*smith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth*, *J.* (1882). V.

168.—**Seal of company—Presumption of due execution of instrument.**—Where an instrument is under the seal of a company, and appears to have been executed in proper form, and has been acted upon, there is a strong tendency to support it, even if there may have been technical irregularities in the proceedings, or in the appointment of directors. *Bank of New Zealand v. Rose*, 10 N.Z.L.R., 484 (1891). N.Z.

#### XIX.—SHAREHOLDER.

169.—**Shareholder—Liability—Directors—Acquiescence.**—A shareholder in a company not a director who is present but silent at a meeting of directors when a course of conduct is agreed upon which makes the directors taking part in the proceedings personally liable, is not bound to contribute to recoup those directors for money which they have had to pay in consequence of their action at such meeting. "The only ground on which the defendant can be held answerable is his acquiescence, and the only evidence of acquiescence is his silence at the meeting. But such evidence, in our opinion, is of no avail unless the person who remained silent was obliged to speak. Silence when a person is not obliged to speak is the same as if he was absent."—*Per Stawell, C.J. Cherry v. Perkins*, 3 A.J.R., 51. Banco (1872). V.

170.—**Liability of shareholder—Mining Companies Act 1871, secs. 13, 52, 56.**—So long as the name of a shareholder in a mining company appears on the register of shareholders, he is liable to have payment of calls not more than twelve months old enforced against him by justices, though the calls be more than fourteen days old, jurisdiction in the matter being given to justices by sec. 52 of the *Mining Companies Act* 1871 (No. 409), and sec. 54 of the same Act not operating to forfeit the shares by non-payment of calls, but leaving the directors an option of suing for calls instead of enforcing the forfeiture. *Reg. v. Macgregor, ex parte Wilkinson*, 6 V.L.R. (L.), 167; 2 A.L.T., 4, *sub-nom.*, *ex parte Wilkinson*. *Stawell, C.J., Barry and Stephen, JJ.* (1880). But see 27 *supra*, *King's Birthday Q.G.M. Co. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885). V.

171.—**Mining companies—Amalgamation—**

**Shareholder repudiating amalgamation—Subsequent claim to be placed on share register.**—Where a mining company, A., was amalgamated with another, B., on the terms that shares in the amalgamated company should be allotted to the shareholders in company A., and one of the shareholders in that company refused to assent to the amalgamation, and repudiated the shares allotted to him in the amalgamated company: *Held*, that the amalgamation was not binding on him, and he might have followed the property of company A. into the hands of the amalgamated company; but that he could not, under the circumstances, claim to be a shareholder in the amalgamated company, and to have his name put on its register of shareholders. *Cock v. Lady Barkly G.M. Co. Regd.*, 8 V.L.R. (M.), 51; 4 A.L.T., 115. *Molesworth, J.* (1882). V.

172.—**Action by shareholder—Delay—Acquiescence—Costs.**—A shareholder in a mining company whose shares had been forfeited, lying by for six years, making no inquiries, and filing his bill after the company proved a success: *Held*, *per Molesworth, J.*, not barred by laches or acquiescence, but disentitled to costs. But, *semble*, *per F.C. (Stawell, C.J., and Holroyd, J.)*, he would be barred. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 10, 98 (1883). V.

173.—**Unregistered mining company—Covenant to pay calls—Action against shareholder.**—*See* PARTNERSHIP.

174.—**Shareholders—Action against—Stay of—Companies Act 1864 (S.A.).**—*See* PRACTICE, 472.

175.—**Prospectus—Misrepresentation.**—*See* COMPANY, 143.

#### XX.—SHARES.

*See* COMPANY (CALLS, DIRECTORS, NO LIABILITY, WINDING-UP).

176.—**Profits of.**—The profits of mining shares as between persons successively entitled, or tenderer and tenderer, go to the person entitled, when the dividend is payable—not when the gold is raised. The profits of shares in mining companies are dividends, not gold raised. *Shaw v. Wright*, 2 W. & W. (E.), 57. *Molesworth, J.* (1863). V.

177.—**Mortgage of shares.**—R. deposited with N. 130 scrip in a mining company registered, as

security for payment of a debt. N. gave notice that he would sell by auction; the auction took place and N. became the purchaser. N. resold to M.; at the time of the sale to M. he had notice of R.'s claim. *Held*, that N. was trustee for R.; that although he had a right to sell, he could not himself become the purchaser, and that the sale to M. should be set aside. Sale by pledgee should be preceded by notice to pledgor, if practicable. The sale should not be to the pledgee or trustee for him, and should be by auction. *Ryan v. Mackintosh*, 4 W.W. & A'B. (E.), 8. *Molenvorth, J.* (1867). V.

178.—*Register—Transfer.*—The register of a company under Act No. 228 is only *prima facie* evidence of the persons mentioned in it being shareholders of the company. A defendant in a complaint for contribution or calls may show that although his name is on the register, yet that he has transferred his shares, and that the transfer was approved by the directors of the company. *Quere*, if the register be even *prima facie* evidence. *Pilley v. Hart*, A.R., 28th Nov., 1867. V.

179.—*Shares—Agreement—Waiver.*—W. entered into an agreement with a company to take up 950 shares, to be allotted to him by the company. On his application, as collateral security for his fulfilling his part of the agreement, he gave the company a cheque for the whole number of the shares so agreed to be taken. The cheque was not to be presented by the company for six weeks after date. W. applied for shares in pursuance of the agreement and the company refused for some reason to allot them. He again applied for and obtained 350 of the shares, and could have had the remaining 600 had he chosen. He did not apply for them and the 600 were forfeited. The company then sued W. to recover the amount of the cheque, less £175, the amount paid for the 350 shares taken. *Held*, that the company was entitled to recover, as the breach on the part of the company in at first refusing the shares was waived by the defendant's subsequent application for and the acceptance of the 350. *Golden Lake Gold and Tin M. Co. v. Wood*, 6 W.W. & A'B. (L.), 170; N.C., 2. Banco (1869). V.

180.—*Forfeiture of shares in companies under Act No. 228.*—The Act No. 228, sec. 39, does not authorise companies formed under it to make

rules after incorporation for the forfeiture of shares of members of the company. *Nolan v. Annabella G.M. Co. Regd.*, 6 W.W. & A'B. (M.), 38; N.C., 19. *Molenvorth, J.* (1869). See Act No. 354. V.

181.—*Act No. 228—Invalidity of rules for forfeiture—Contribution.*—S. was the holder of shares in a mining company, registered under the Act No. 228. The rules of the company were in the form of a deed of association which was adopted and executed before the company was registered. One clause of the deed provided that in certain events the directors might forfeit the shares of a member of the company. Acting under this clause, after the registration of the company, the directors declared S.'s shares forfeited, and no further demand was made upon him by the company, which was ultimately ordered to be wound up. The official agent sued S. for contributions on the forfeited shares, on the ground that the rules authorising the forfeiture were invalid, as being *ultra vires*, and that S. had not ceased to be a shareholder. *Held*, that S. was liable; that the Act No. 228 did not authorise a company registered under it to make rules for the forfeiture of shares, and that there was no distinction between rules passed before, and those after incorporation. "To hold otherwise would be in effect to say that a company had only to pass rules inconsistent with the Act and then be registered, and that these rules would be in force, although in direct contravention of the provisions of the Act under which the company is registered, and by which it receives large advantages."—*Per Stowell, C.J.* *Jenkins v. Speed*, 6 W.W. & A'B. (L.), 255; N.C., 67. Banco (1869). V.

182.—*Neglect of manager to comply with rule.*—A rule of a company registered under the Act No. 228, provided that after the shares of any member of the company had been declared forfeited, the manager should enter in the share register the words "forfeited by a resolution of the board of directors" opposite the shares so forfeited. *Held*, that the omission of the manager to make this entry did not vitiate a forfeiture otherwise properly made. *Reeves v. McCafferty*, 1 A.J.R., 153. Banco (1870). V.

183.—*Power of directors to make calls—Liabilities before incorporation.*—An ordinary mining partnership company were the holders

and owners of a mine and plant. The partnership was indebted to various persons. A company called the "Myrtle Creek Quartz Mining Company," registered under the Act No. 228, took over the property of the former partnership, and became bound to pay its liabilities. The directors of the incorporated company made a call on the capital to pay off a creditor of the former partnership, who by agreement was entitled to receive from the incorporated company a bill of sale over the mine and plant. The rules provided that the shareholders should be bound to contribute to the capital of the company in proportion to the shares held by them; such contributions to be paid in such instalments, or calls, as the directors should appoint. *Held*, that as the incorporated company was bound ultimately to pay the debt, and was obliged at the instance of the creditor to give to him a bill of sale over the company's property, for which he was pressing, and as the directors had free power under the rules to make the calls, they exercised a reasonable power in making the call to pay off that debt; and that a forfeiture of shares for non-payment of the call so made could not be impeached, on the ground that it was made with an improper object, or that it was *ultra vires*. A suit instituted to set aside such a forfeiture was dismissed. *M'Lennan v. Myrtle Creek Q.M. Co.*, 1 A.J.R., 157. *Molesworth, J.* (1870). V.

184. — Shares in registered company — Conditions precedent.]—When the rules of a company required certain advertisements to be published and certain conditions to be observed by the company before directors could declare any shares forfeited: *Held*, that a strict compliance with the rules by inserting advertisements and observing the specified conditions could alone warrant a forfeiture; and that if the advertisements were not inserted and the conditions complied with, a forfeiture would be illegal and void. *Wood v. Freehold United G.M. Co.*, 1 A.J.R., 173. *Molesworth, J.* (1870).

185.—Act No. 228, sec. 39—Forfeiture of shares — Rules—Partnership deed—Act No. 354—Rehearing on appeal—Practice—Special case.]—The members of a company, formed under Act No. 228, may, by partnership deed, provide that the directors of the company may, in certain cases, declare the shares of its members to be forfeited. But a majority could not, prior to

the Act No. 354, under Act No. 228, sec. 39, pass a rule providing for forfeiture. *Nolan v. Annabella G.M. Co.*, 6 W.W. & A'B. (M.), 38, explained. *Jenkins v. Speed*, 6 W.W. & A'B. (L.), 255, commented upon and dissented from. *Costerfield Co. v. Shaw*, 1 V.R. (M.), 7; 1 A.J.R., 17. *Molesworth, J.* (1870). V.

186.]—The Act No. 354, passed 29th December, 1869, enacts the validity of forfeitures made by companies under Act No. 228, and directs that they shall be deemed valid, saving the rights of plaintiffs in suits instituted before August, 1869, but not providing for suits instituted after that date, in which decrees were made prior to the 29th December, 1869. *Seem*, that on appeal to the Chief Judge from such a decree, heard after the passing of the Act No. 354, the Chief Judge would not reverse a decree which he thought was right, according to the law when it was made, but if he reheard the case, he would decide it according to the law, at the time of the rehearing. *Ibid*. V.

187.]—When a judge of the Court of Mines, in a special case, sets out the effect of the evidence taken in the suit without ambiguity, the Chief Judge will not rehear the case, upon the assertion that the evidence is not set out *verbatim* or truly as to effect. But he will rehear when facts material to the decree do not appear to have been made the subject of evidence, and when the evidence being set out, the Chief Judge can arrive at no conclusion. *Ibid*. V.

188.]—Forfeiture—Act No. 354 — Meetings — Notice of business—Calls—Expenses of litigation —Notice of intention to forfeit—Tender of call after forfeiture—Irregularity—Neglect of shareholder.]—On the 4th December, 1869, M. commenced a suit in the Court of Mines at Creswick, against the Creswick Grand Trunk Company, Registered (formed under the Act No. 228), to be declared entitled to certain shares in the company, which he alleged had been improperly and illegally forfeited by the directors, and to be paid dividends which had been declared on them. The Act No. 354, for making forfeitures legal and valid, was passed on the 29th December, 1869, before the suit came on for hearing. The company's deed of partnership provided *inter alia*:—That a special meeting should be convened by notice, stating the particular business to be transacted thereat, and that no other business should be entered upon or discussed at such

meeting. That the directors might bring actions or suits on account of the property of the company. That if calls were unpaid after notice the directors might declare the shares forfeited, subject to such forfeiture being confirmed by the next special meeting. The Court of Mines decided against the plaintiff; and on appeal to the Chief Judge it was held—(1.) That assuming the forfeiture to have been declared in accordance with the deed, the Act No. 354, sec. 2, made it valid. (2.) That a notice declaring the business of the special meeting to be, *inter alia*, for confirming the forfeiture of shares, was sufficient to enable the meeting to confirm the forfeiture of certain shares, which had been declared forfeited by the directors, after the notice calling the special meeting had been issued. (3.) That in view of the terms of the deed, the directors could make calls for defraying the expenses of litigation carried on concerning the company's property. (4.) That tender of payment of calls due on shares previously forfeited for non-payment, could have no effect on a previously declared forfeiture. *Semble*, that an irregular forfeiture will not be set aside when the shareholder has been guilty of delay in claiming restitution, and has been negligent, and has declined to pay calls when the speculation looked bad. The appeal was dismissed. *Marshall v. Creswick Grand Trunk Co.*, 1 A.J.R., 85. *Molesworth, J.* (1870).

V.

**189.—Broker—Cause of action—Pecuniary interest of plaintiff—Nonsuit.**—K. sued D. in the County Court for breach of an agreement, by which D. promised to sell and transfer certain shares to K. K. stated in evidence that he had no pecuniary interest in the transaction, and that he was only the broker. The judge nonsuited K. *Held*, on appeal, that the nonsuit was right, as the cause of action set forth in the summons was not supported by the evidence. *Kershaw v. Duncan*, 2 A.J.R., 83. Banco (1871).

V.

**190.—Sale—Tributes—Companies not registered—Act No. 228.**—On the 14th of August, 1871, the Golden Fleece Company passed a resolution to allot shares in the tribute companies Nos. 2 and 3 to shareholders in the original company, in proportion to the shares held by each shareholder, and advertised that shareholders would receive the shares in the tribute companies on leaving their original scrip at the

office before the 19th August. On the 18th August G. purchased 200 original shares, left them at the office for registration in his name, and received them back the same day. On the 29th August, G. resold to B. his original shares. G. then applied to the manager for his tribute shares, but was refused, the manager saying that the tributes would be issued to B., the present holder of the original scrip. G. then brought an action against the Golden Fleece Company for not allotting to him the shares in the tribute companies. The tribute companies were not registered till the 5th September. Verdict for plaintiff. On rule *nisi* for a nonsuit: *Held*—(1.) That the action was properly brought against the defendants, as they had promised to allot the shares and had afterwards refused to deliver them. (2.) That under the Act No. 228, tribute companies could exist without registration, and (3.) That the tribute companies having been formed before the sale by the plaintiff of his shares in the present company, the sale did not carry with it the tribute shares, and the plaintiff was entitled to them. Rule discharged. *Gordon v. Golden Fleece Co.*, 3 A.J.R., 80. Banco (1872).

V.

**191.—Tributes—Written contract—Evidence—Local custom.**—Chalk sued Chaplin for damages for not delivering certain tribute shares. The written contract was for shares without mentioning anything of tributes. The shares had been delivered, but not the tributes alleged to go with them. *Held*, that evidence was inadmissible to show that the shares mentioned in the written contract carried tributes. *Quare*, as to whether evidence of local custom on the point was admissible. *Semble*, that it was not. *Chaplin v. Chalk*, 3 A.J.R., 26. Banco (1872).

V.

**192.—Sale—Evidence—Broker.**—C. sued M. for non-delivery of shares. C. gave evidence of a verbal sale from M. to him of the shares, and also gave, in evidence, the note delivered to M., which ran thus:—"C., stock and sharebroker, sold by order and for account of M." The judge nonsuited the plaintiff on the ground that the note showed the contract, that evidence was inadmissible to vary its terms, and that C. was merely broker for the defendant. *Held*, that the nonsuit was wrong, as there was evidence both ways as to whether the plaintiff acted as principal or as agent, and the case could not

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therefore be withdrawn from the jury. *Clarke v. Mellor*, 3 A.J.R., 39. Banco (1872). V.

**193.—Sale—Wrongful conversion.]—**G. sued C. for wrongful conversion of some scrip certificates. C. sold the shares to G. and delivered them to him, but was not paid. G. gave them back to him, and told him to deliver them to R., who would pay him for them, as he, G., had sold them to R. R. told C. he had bought them and would pay for them when delivered. C. never delivered to R. *Held*, that G. had parted with his right to the shares, and could not sue for their wrongful conversion. *Grant v. Chalk*, 3 A.J.R., 43. Banco (1872). V.

**194.—Shares—Claim—Warranty.]—**D. purchased from B. shares in a mine at Sandhurst under a special agreement by which B. represented that the company's claim was not liable to forfeiture in any manner whatsoever. D. subsequently discovered that at the time of the purchase the number of men required by the by-law to be employed had not been employed. D. thereupon brought an action against B. to recover the amount of the purchase-money. On special case stated by the parties: *Held*, that as the by-laws enacted a forfeiture if the proper number of men was not employed, the claim was liable to forfeiture and the plaintiff was entitled to recover. *Davis v. Bull*, 3 A.J.R., 66. Banco (1872). V.

**195.—Lending shares to enable non-shareholders to vote.]—**C. lent to L. 100 shares in the W.F. company for the purpose of enabling L. to vote at a meeting of the company, L. not being a shareholder. He afterwards became *non compos*. His representative declined to return the shares to C. C. brought an action to recover them against his representative. Verdict for plaintiff. On rule *nisi* to enter verdict for the defendant: *Held*, that the shares had been given for an illegal purpose, and that the Court would not assist the plaintiff to recover them. Rule absolute to enter verdict for defendant. *Cane v. Levey*, 3 A.J.R., 81. Banco (1872). V.

**196.—Contract—Exclusion of shareholders—Bank dealing with shares as security—Director.]—**S. was a shareholder and acting director of the Golden Gate Mining Company; E. was also a shareholder. E. being indebted to the Bank of Victoria deposited his shares with them as security for an overdraft, and afterwards made

an assignment for the benefit of his creditors. S. then resigned his directorship, and caused a warden's summons to be issued against the company for a declaration of forfeiture of the company's claim, and for possession. This summons was dismissed, and S. appealed to the Court of Mines. On the day of dismissal, S.H., a director of the A1 Company, and also of the Golden Gate Company, Scott the manager of the Golden Gate Company, and B., an officer of the bank, met, and S. signed the following document as the result of the conference:—"I hereby undertake to withdraw my application for the possession of Crown land, late in the occupation of the Golden Gate Mining Company, Registered, situate at Raspberry Creek, and also agree to an amalgamation of the A1 Company of the same place, in consideration of the Bank of Victoria giving and undertaking to meet the liabilities of Mr. D. Eisenstadter's shares in the said company, so long as the said bank shall hold shares as security, and have the right to draw the dividends (if any) therefrom.—W. V. SMITH." "Memo.—Eighty shares in an amalgamated company, as here described, are the same as represented by 160 shares in the Golden Gate Company; that is the 100 originally held by Smith, and the 60 to be given by Hogarth." This was signed by Scott, the manager of the Golden Gate Company, and S. received the 60 shares from H. An undertaking signed by the manager of the Bank of Victoria, was given to the company in accordance with this document. The bank by arrangement with the trustees of E., sold the shares and they were bought by various officers of the bank as trustees for the bank. S. objected to the undertaking as insufficient and to the sale and resolved to go on with his appeal. On the hearing of the appeal before the Court of Mines, the judge reserved a special case for the opinion of the Chief Judge. The Chief Judge decided the points reserved in favour of S. S. then intimated to his co-shareholders that if they assisted the bank in carrying on litigation with him, he would not give them back their interest in the ground as he had all along intended to do, but would keep the claim himself. The company thereupon withdrew from the case, and did not appear at the Court of Mines when the hearing of the appeal was concluded, and a decree made in favour of S. The bank then instituted a suit against S. for the recovery of the shares. The Supreme Court decided in favour of the bank. S. appealed to the Privy



Council. *Held*, on appeal, that:—(1.) The contract above set out was one contract for two considerations, and that both considerations were fulfilled before S. expressed an intention to withdraw from his undertaking. (2.) The undertaking was sufficient, although not under the seal of the bank. (3.) The sale of the shares was consistent with the contract. (4.) The arrangement with the shareholders of the company, for the purpose of excluding from the company one shareholder, could not be allowed to stand. (5.) The bank, in its dealing with the shares, had not violated its Act of Incorporation. (6.) S. was a trustee of the shares for all the shareholders, including the bank, and that his appeal must be dismissed. *Quere*: How far it would be open to a man who is a director or a person in any other fiduciary position, when there is a forfeiture committed from any cause, to resign his office, and take proceedings for the purpose of availing himself of that forfeiture, and obtaining the property for his own benefit, to the exclusion of his *cestui que trustent*. *Semble*, that such a course would not be open to him, and *held* further that a director or other person holding a fiduciary position, who causes a forfeiture, cannot avail himself of it. *Smith v. Harrison, aliter Smith v. Bank of Victoria*. J.C., *James and Mellish, L.J.J., Sir Montagu E. Smith and Sir R. P. Collier*, 41 L.J.P.C., 34; 27 L.T., 188; 20 W.R., 594; 3 A.J.R., 44. V.

197.—Act No. 228—Directors—Call—Laches.]—A company registered under the Act No. 228 could not make a rule which enabled directors to remain in office for more than a year. A call made by directors so continuing in office is illegal, and the forfeiture of shares for non-payment of such illegal call is likewise illegal. A shareholder whose shares have been illegally forfeited is not barred by unnecessary delay in not applying to have the forfeiture set aside, as under the Act No. 228 he remains a shareholder, and is liable for calls, notwithstanding the attempted forfeiture. *Schmidt v. Garden Gully Co.*, 4 A.J.R., 66. *Molesworth, J.* (1873). V.

198.—Application for shares—Evidence of allotment.]—An intending shareholder sent in an application to a company for shares, enclosing a deposit with a request to have it returned in the event of non-allotment. The deposit was retained, and the applicant never asked for his money. *Held*, evidence that he was aware that

his application had been accepted. *Legal and General Life Assurance Co. v. Gill*, 4 V.L.R. (L.), 208. *Banco* (1878). V.

199.—Assignment of scrip in blank.]—An assignment of scrip in blank—if not inconsistent with rules—signed by the transferror to be filled by ultimate purchasers is valid as between the parties to it. *Atkinson v. Lansell*, 4 V.L.R. (E.), 242. *Molesworth, J.* (1878). V.

200.—Principal and agent—Jus tertii—Sale of shares—Forfeiture—Parties.]—An agent cannot set up a *jus tertii* against his principal in a suit between them, relating to the subject matter of the agency. H. arranged with C., the manager of a mining company, that C. should purchase as H.'s agent certain forfeited shares in the company, which were about to be sold by auction. C. accordingly purchased the shares, and the purchase money was deducted from the amount of a bill due by the company to H. C. issued scrip certificates of the shares in his own name and gave them to H., but subsequently refused to execute transfers of them, so as to enable H. to be registered as the owner of them, alleging that the sale was invalid, the proper preliminaries to forfeiture of the shares not having been complied with; and also insisted that the former owners of the shares, and the company, were necessary parties to the suit. *Held*, that the former owners and the company were not necessary parties; that C. being agent for H., could not set up, as against his principal, the invalidity of the forfeiture or sale, which, if invalid, might be impeached either by the company, or by the former holders of the shares, in a proceeding between them and H. *Hardy v. Cotter*, 7 V.L.R. (E.), 151. *Holroyd, J.* (1881). V.

201.—Money had and received—Money deposited in trust to pay a dividend—Revocation of dividend before payment—Right of company to recover money.]—The directors of a company paid a sum of money to the defendants, to be applied in payment of a dividend then declared. Such dividend was advertised. Two of the defendants made a conditional promise to some of the shareholders that they would pay them the dividend if the third defendant would sign the cheques, which he refused to do, and no money was paid. The company subsequently rescinded the resolution declaring a dividend. *Held*, that the company was entitled to obtain repayment

of the money from the defendants. *United Hand and Band Co. No Liability v. M'Iver*, 7 V.L.R. (L.), 471. *Stawell, C.J., Higinbotham and Williams, J.J.* (1881). V.

**202.—Mining company—Call—Forfeiture—Notice.]**—Where a company had power, on non-payment of a call (1) to debit the shareholder's account therewith and with interest thereon at 15 per cent., or (2) to proceed against him to recover it, or (3) to forfeit the shares; and the shareholder was served with notice that the directors would, at their option, proceed to forfeit and sell the shares for the amount due and 15 per cent. interest: *Held*, such notice was bad. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 98. *Molesworth, J.* (1883). V.

**203.—Mining company—Shares in arrear of call—Forfeiture.]**—Where directors met "to deal with shares in arrear of call," and decided that all shares in arrear should be sold by auction: *Held*, that a forfeiture could not be inferred therefrom. There should have been a distinct vote of forfeiture of the shares by names and numbers. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 98. *Molesworth, J.* (1883). V.

**204.—Mining Companies Act 1871 (No. 409), secs. 50-57—Shares in company—"Absolute forfeiture"—Liability to calls.]**—A shareholder in a mining company, registered under Part I. of the *Mining Companies Act 1871* (No. 409), whose shares have become forfeited under sec. 54 of the Act, is thereby relieved from liability for the call the non-payment of which has occasioned the forfeiture, and for any calls subsequently made by the company. *King's Birthday Q.G.M. Co. Ltd. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C., *Higinbotham, C.J., Williams and Holroyd, J.J.* (1885). V.

**205.—Forfeiture of shares—Amalgamation of companies—Suit by shareholder for rectification of register—Parties.]**—A shareholder in a mining company, whose shares had been forfeited and name removed from the register, filed his bill against the company impeaching the forfeiture and seeking to have his name restored to the register. The answer of the company averred, and it was proved in evidence, that after the forfeiture the company had amalgamated with another company, and fresh shares had been

issued to all the shareholders in the two companies, of which the original shareholders in the company received two for every three originally held by them. *Held*, that the present holders of the shares representing the plaintiff's original shares were necessary parties to the suit. *Cushing v. Lady Barkly G.M. Co.*, 9 V.L.R. (E.), 108; 5 A.L.T., 98. F.C., *Stawell, C.J. and Holroyd, J.* (reversing *Molesworth, J.*), (1883). V.

**206.—Mining Companies Act 1871 (No. 409), secs. 27, 28—Transfer of shares.]**—No transfer of a share in a mining company is of any effect or validity at law or in equity until the name of the transferee be entered as such transferee in the register of shareholders. *Fatorini v. Hill*, 8 A.L.T., 87. *Higinbotham, C.J.* (1886). But see next case. V.

**207.—Mining Companies Act 1871 (No. 409), sec. 27—Charging shares.]**—Sec. 27 of the *Mining Companies Act 1871* (No. 409), only relates to a transfer of shares as between a company and its members, and does not absolutely prohibit the creation of equitable rights enforceable against the shareholder by any means short of registered transfer. *Fatorini v. Hill*, 8 A.L.T., 87, dissented from. *Deane v. Gillespie*, 8 A.L.T., 140. *a'Beckett, J.* (1887). V.

**208.—Mining Companies Act 1871 (No. 409), secs. 118, sub-secs. 1, 5—Registered company—Unregistered mining partnership—Forfeiture of shares—Pleading—Inconsistent or alternative cases.]**—A plaintiff sued a mining company and its legal manager for an alleged forfeiture of his shares, alleging that it was an unregistered mining partnership, because at the time of its alleged registration 5 per cent. of its subscribed capital had not been paid up in accordance with sec. 118, sub-sec. 1 of the *Mining Companies Act 1871* (No. 409), and claiming a declaration that the alleged forfeiture of his shares was invalid, and an order that the company should restore his interest on payment by him of all moneys due thereon. He also alleged that if it were a properly registered company, the sale by it of his shares was ineffectual against him, because the directors had not appointed a day for sale as required by the Act, sec. 118, sub-sec. 5; or if they were properly offered for sale, no sale in fact took place; or if such sale did take place, that it was invalid, as it was made to the manager of the company. A preliminary objection was taken at the hearing before *Webb, J.*,

that the other shareholders were necessary parties, on considering which the Court held that they were necessary parties on that part of the case which was based on its being an unregistered mining partnership, and declined to proceed with that part of the case in their absence. It offered, however, to proceed with the other aspect of the case if that were given up, but the plaintiff refused this, and the case was struck out of the list. On appeal by the plaintiff to the Full Court, the plaintiff was given liberty to proceed with the whole case upon adding a defendant, a shareholder other than himself and the manager, to represent the shareholders generally. *Robertson v. Wealth of Nations G.M. Co.*, 14 V.L.R., 584. F.C., *Higinbotham, C.J.*, *Williams and Holroyd, J.J.* (1888). V.

**209.—Forfeiture of shares—Acquiescence by shareholder.**—Acquiescence by a shareholder is no answer to his claim against the company that it has wrongfully treated his shares as forfeited when they were not legally forfeited. *Clarke v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 976. *Webb, J.* (1888).

**210.—Mining Companies Act 1871 (No. 409), sec. 50—Forfeiture of shares—Notice of call—Notice of sale of forfeited shares—Misnomer of company.**—A forfeiture of shares in a no-liability mining company must be enforced *strictissimi juris*, and notice of a call in the company, as well as notice of the sale of shares forfeited for non-payment of the call, must be advertised in the *Government Gazette* in the correct name of the company. If, therefore, notice of a call in the Moonlight Extended Quartz Mining Company be advertised in the name of the Moonlight Extended Gold Mining Company, and the same mistake be made in the advertisement of notice of sale of shares forfeited for non-payment of the call, a shareholder, whose shares have been so forfeited and sold, will be entitled to a declaration that they were improperly forfeited and sold. *Clarke v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 976. *Webb, J.* (1888). But see *McDougall v. Moonlight Extended Q.M. Co.* (*infra*). V.

**211.—Mining Companies Act 1871 (No. 409), sec. 50—Notice of call—Publication of notice—Misnomer of company—Forfeiture of shares.**—The notice of a call in a mining company having been made, required by sec. 50 of the *Mining Companies Act 1871* (No. 409), to be published,

need not state the name of the company correctly or even at all. If the notice is in fact reasonably sufficient to satisfy the whole body of shareholders in the company that a call in that company has been made, it is a sufficient compliance with the section. *McDougall v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 987. F.C., *Higinbotham, C.J.*, *Kerferd and a'Beckett, J.J.* (1888). V.

**212.—Judicature Act 1883 (No. 761), secs. 64, 65—Shares forfeited for non-payment of call—Charging order.**—By sec. 64 of the *Judicature Act 1883* (No. 761), the judgment creditor is entitled to be placed only in the same position as the judgment debtor, and therefore shares which have been forfeited cannot be charged, and the company has the right to sell the shares even after service upon it of the order *nisi* purporting to charge the shares. *Hyman v. Smith*, 10 A.L.T., 254. *Hodges, J.* (1889). V.

**213.—Mining Companies Act 1871 (No. 409), sec. 118, sub-sec. 5—Shares forfeited for non-payment of call—“Absolutely forfeited.”**—The words “absolutely forfeited” in sec. 118, sub-sec. 5 of the *Mining Companies Act 1871* (No. 409), are to be taken in their literal sense, and the share is gone from the owner, who ceases to be a shareholder at the expiration of the time limited for payment of the call. All that he has, is the right of tendering the money due on the shares to the company before they are sold, and so preventing them being sold. He has an interest in the proceeds of the shares, but not in the shares themselves. *Hyman v. Smith*, 10 A.L.T., 254. *Hodges, J.* (1889). V.

**214.—Forfeited shares—Liability to call.**—Shares forfeited for non-payment of a call are liable to calls though standing in the hands of the company, and if they be sold by the company after a further call is made, but before it is payable, the purchaser is liable for such call. *Moore v. Wheel Byjerkerno Tin M. Co.*, 17 V.L.R., 680; 13 A.L.T., 108. *Webb, J.* (1891). V.

**215.—Mining Companies Act 1871 (No. 409), secs. 56, 118, sub-sec. 5—Forfeiture of Mining Shares Validity Act 1882 (No. 742), sec. 7—Forfeited shares—Advertisement of sale—Postponement of sale—Fresh appointment of sale—Fresh right to redeem.**—If forfeited shares have been duly put up for sale and not sold, the company has a fresh right to appoint another sale,

and the shareholder a fresh right to redeem up to the day previous to that newly appointed for the sale. *Moore v. Wheel Byggekerno Tin M. Co.*, 17 V.L.R., 680; 13 A.L.T., 108. *Webb, J.* (1891). V.

**216.—Forfeiture of shares—Call made by unqualified directors—Qualification of directors—Forfeiture of directors' shares—Redemption of shares—De facto directors.]**—The articles of association of a no-liability company provided that the company should be under the management of a board of directors "consisting of five shareholders, each of whom shall hold and continue to be the holder and registered in the books of the company for at least 100 shares," and provided that certain persons named "shall be the first board of directors of the said company, and shall continue in office until the general meeting of the company, to be held in January, 1879." That at that meeting "the whole of the directors shall retire from office, and five directors be elected to fill the vacancies, and such directors shall continue in office until the next general meeting of the company, when the two members of the board of directors for whom the fewest votes were recorded shall retire from office, and the new board of directors shall continue in office until the next general meeting, when the three senior members of the said board shall retire from office, and at the next general meeting of the company the two senior members shall retire from office, and so on, the three senior members and the two senior members retiring alternatively. Provided that any director absenting himself without leave of the board from five consecutive meetings of the directors shall forfeit his office, and another director be elected in his place. Provided also that any director may vacate office by sending in his resignation to the manager, and if any director shall resign or refuse to act in his office, or have his estate sequestrated for the benefit of his creditors, or die, or be appointed to any office or place of profit under the company, or be concerned or participate in the profits of any contract with the company, then, and in every such case, any meeting of the directors at which a quorum shall be present shall have power to appoint any shareholder, not at such time a director, in the place and stead of such director so resigning, refusing, dying, or having his estate sequestrated as aforesaid, until the next general

meeting of the company. The powers of the directors shall not cease or be suspended so long as the same shall consist of a sufficient number of members to form a quorum. Three directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the board of directors." *Held*, that the directors who had not paid the calls on their shares at the expiration of fourteen days from the time when they were made payable, ceased to be shareholders, and under the above articles ceased to be directors, and the subsequent payment of their calls did not reinstate them as directors. At the meetings of directors, at which the 59th, 60th, and 61st calls were made, there was not a sufficient quorum of directors who had paid previous calls within fourteen days of the time when they were made payable, but 400 shares held by a shareholder were forfeited for non-payment of those calls, and sold. On action by the shareholder to recover the shares, or in the alternative for damages: *Held*, that the calls were badly made, and the plaintiff's shares could not, in the absence of any provision in the articles validating the acts of *de facto* as distinguished from *de jure* directors, be legally forfeited. *Held*, further, that the action was in the nature of an action for conversion of property, and that the plaintiff was entitled to recover 400 shares in the company, if the company could appropriate or purchase and register in the names of the plaintiffs the same, notwithstanding that since forfeiture they had immensely increased in value, but that, failing that, the measure of damages to which the plaintiff was entitled was the value of the shares at the time of forfeiture. *Haddow v. Duke Co.*, 18 V.L.R., 155. F.C., *Higinbotham, C.J., Williams and Holroyd, JJ.* (1891-2). V.

**217.—Mining Companies Act 1871 (No. 409), sec. 56—Forfeiture of shares—Non-payment of call.]**—Shares in a no-liability company become absolutely forfeited on the expiration, without payment, of fourteen days from the day on which a call is made payable, and the subsequent redemption of the shares under sec. 56 of the *Mining Companies Act 1871* (No. 409) does not vest the shares *ab initio* so as to avoid the forfeiture, but merely creates a new right in the shares from the time of redemption. *Haddow v. Duke Co.*, 18 V.L.R., 155; 13 A.L.T., 4. F.C., *Higinbotham, C.J., Williams and Holroyd, JJ.* (affirming *Webb, J.*), (1891-2). V.

**218.—Companies Act 1890 (No. 1074), secs. 241, 242, 244, 247—Forfeited shares—Calls.]—Calls cannot be made on forfeited shares during the period of their forfeiture. *Morley v. Gore*, 19 V.L.R., 199; 14 A.L.T., 117; 15 A.L.T., 27. F.C., *Williams, Holroyd and Hodges, JJ.* (affirming *a'Beckett, J.*), (1892-3). V.**

**219.—Companies Act 1890 (No. 1074), secs. 241, 242, 244, 247—Sale of forfeited shares—Liability of purchaser for past calls.]—*Semble, per Holroyd, J.* :—Assuming that when a forfeited share is sold it ought not to be treated as paid up to the same amount as the non-forfeited shares on which the calls have been paid, then the person who buys such forfeited share may be liable for the whole amount of unpaid capital, but not to pay the past calls. *Morley v. Gore*, 19 V.L.R., 199; 15 A.L.T., 27. F.C. (1893). V.**

**220.—Companies Act 1890 (No. 1074), sec. 244—Forfeited shares—Purchase by company—Disposal by company—Special meeting.]—Shares in a no-liability company, forfeited for non-payment of a call, and purchased at public auction by the directors on behalf of the company, under sec. 244 of the *Companies Act* 1890 (No. 1074), can only be disposed of under that section in such a manner as the shareholders, at a general or extraordinary meeting called for the purpose, may have directed. *Semble*, therefore, that a resolution passed at a special meeting of the company, purporting to distribute them among the then shareholders, is bad. *Sadler v. Spread Eagle Co.*, 19 V.L.R., 492. *Holroyd, J.* (1893). V.**

**221.—Companies Act 1890 (No. 1074), sec. 243—Limitation of actions after advertisement of sale of shares.]—By sec. 243 of the *Companies Act* 1890 (No. 1074), it is provided that no action shall be brought in respect of any shares in a company registered under the *Mining Companies Act* 1871, against a company by a person interested in such share, unless such action "be commenced within six months from the day appointed for the sale of such share." *Held*, that the six months commence to run from the the day first appointed for the sale of the shares after the forfeiture, although such sale may have been postponed from that day so first appointed to another day. *Tipping v. Prince of Wales and Bonshaw G.M. Co.*, 20 V.L.R., 218. *Madden, C.J.* (1894). V.**

**222.—Companies Act 1890 (No. 1074), sec. 243—Forfeiture of shares—Limitation of action.]—Several persons acted as directors of a mining company, but were disqualified from holding the position. Acting as directors they purported to make a call on all the shares. A., who held a number of shares, did not pay the call, and the shares were sold as having become forfeited. In an action brought by A. in respect of the shares, which was not begun until six months after the day appointed for the sale: *Held*, that the action was barred by sec. 243 of the *Companies Act* 1890 (No. 1074). *Dalrymple v. Prince of Wales and Bonshaw United Co.*, 16 A.L.T., 168. F.C., *Williams, Holroyd and Hood, JJ.* (affirming *Madden, C.J.*), (1895). V.**

**223.—Companies Act 1890 (No. 1074), sec. 243—Forfeiture of shares—Time limited for bringing action—Ground of forfeiture.]—Sec. 243 of the *Companies Act* 1890 (No. 1074), applies to all actions in respect of shares alleged to have been forfeited, no matter upon what ground the alleged forfeiture is said to be invalid. *Dalrymple v. Prince of Wales and Bonshaw United Co.*, 16 A.L.T., 168. F.C., *Williams, Holroyd and Hood, JJ.* (affirming *Madden, C.J.*), (1895). V.**

**224.—Action for forfeiture of shares—Parties.]—A purchaser of shares in a no-liability company from the registered owner is not entitled to bring an action to have an alleged forfeiture thereof declared void without making the registered owner a party. The Court, however, if such person has not been made a party, may allow an amendment to permit of his name being added, if he consent to be so added. *Dalrymple v. Prince of Wales and Bonshaw United G.M. Co.*, 20 V.L.R., 516. F.C., *Holroyd, a'Beckett and Hood, JJ.* (1894). V.**

**225.—Stock Exchange—Usages of—Duty of broker.]—See *Paule v. Read* (No. 2), 9 N.S.W. S.C.R. (L.), 103. *Stephen, C.J., Hargrave and Faucett, JJ.* (1870). N.S.W.**

**226.—Shares—Mining company—Contract of sale—Rescission—New trial.]—Shares in a mining company having been purchased for cash on a Thursday, and not paid for on Saturday morning following, application for the completion of the purchase having in the meantime been made, the seller rescinded the contract and rejected subsequent offers of payment. In an action by**

the purchaser against the seller for damages for breach of contract, the jury found for the defendant. *Held*, on motion for new trial, that the verdict ought not to be disturbed, as the jury were justified in finding that a reasonable time had elapsed for the completion of the contract before its rescission. *Muston v. Blake*, 11 N.S.W.S.C.R. (L.), 92. *Stephen, C.J., Hargrave and Faucett, JJ.* (1872). N.S.W.

**227.—Shares—Sale of—Principal and agent—“Sold” note.]—**B., through his brokers, sold shares to G., G. being himself a broker and acting for a principal, though at the time of the contract no principal was disclosed. In the “sold note” G. was named as purchaser. *Held*, that G., in his own name, could maintain an action against B. for the non-transfer of the shares. *Garrett v. Bird*, 11 N.S.W.S.C.R. (L.), 97. *Stephen, C.J., Hargrave and Cheeke, JJ.* (1872). N.S.W.

**228.—Shares—Breach of contract—Tender of scrip—Pleading.]—**Plaintiffs in their declaration for breach of agreement to re-purchase shares in a gold mining company, alleged (*inter alia*) a tender of the scrip. That allegation defendant, by his second plea, traversed. *Held*, on demurrer, a bad plea, a tender of the scrip not being essential. *Bird v. Eisenstaedter*, 12 N.S.W.S.C.R. (L.), 249. *Martin, C.J., Hargrave and Cheeke, JJ.* (1874). N.S.W.

**229.—Principal and agent—Broker on Stock Exchange—Instructions to buy named shares—Scrip purporting to be fully paid up—No contract registered under sec. 57 of Companies Act.]—**Plaintiff, a sharebroker and member of the Stock Exchange, brought this action against the defendant for refusing to accept 100 Nevada silver shares. The evidence was that on 7th September, the defendant instructed the plaintiff to purchase for him 100 Nevada shares, to be delivered and paid for on 7th December. Plaintiff purchased the shares, and sent to the defendant a sale-note, “subject to the rules and regulations of the Stock Exchange,” for 100 Nevada shares, “£1 per share paid up.” The defendant indorsed the sale-note as accepted, and returned it to the plaintiff. On December 7th, the plaintiff tendered to the defendant the scrip of 100 Nevada shares, issued under the seal of the company, as paid up to £1 per share. The evidence showed that these were the only

Nevada shares known in the market. The defendant refused to accept the shares on the ground that the shares were not as a matter of fact paid up to £1, and no contract to treat them as so paid up had been filed in accordance with sec. 57 of the *Companies Act*. Neither the plaintiff nor the defendant knew of that fact on 7th September. The District Court judge, before whom the action was tried, received in evidence a copy of Rule 22 of the Stock Exchange, by which a member is disentitled to plead agency in an action brought by the seller for the price of shares sold. The only evidence of knowledge by the defendant of the rules of the Stock Exchange was that he had previously bought stock. Verdict for plaintiff. On appeal, the questions for the opinion of the Supreme Court were:—(1.) Was the judge right in receiving in evidence the rules of the Stock Exchange? (2.) Was he right in finding a verdict for the plaintiff? *Held*, that the verdict was right. The scrip tendered was the only Nevada scrip known in the market, and that was what the plaintiff was instructed to buy for the defendant. *Held*, further, that the copy of the rules of the Stock Exchange was rightly received in evidence. The defendant, having authorised the plaintiff to buy on the Stock Exchange, is bound by such rules. *Palmer v. Upward*, 7 N.S.W.L.R. (L.), 296. *Martin, C.J., Windeyer and Innes, JJ.* (1886). N.S.W.

**230.—Vesting order—“Stock”—“Shares.”]—**Where an order vests (among other things) “stock” in a trustee, the word “stock” includes “shares” in a joint stock company. In this case the board of directors of the Nymagee Copper Company refused to allow a transfer to be made on the ground that the word “stock” did not include “shares.” *Sparke v. Blanton*, 7 N.S.W.L.R. (E.), 39. *Manning, J.* (1886). N.S.W.

**231.—Shares—Creditors Remedies Act (3 Vic. No. 18), sec. 2—Stock or shares in public company.]—***See Blow v. Constable*, 3 N.S.W.W.N., 24. *Windeyer, J.* (1886). N.S.W.

**232.—Shares—Specific performance of contract for sale of—Contract of loan or sale—Shares not in possession of vendors—Shares obtainable in market.]—**Defendants, N. & Son, stock and sharebrokers, wrote to plaintiff as follows:—“We will give you market price for 20 shares, cash at once, and sell the same number back to you for delivery and payment in three months

at £1 less. The effect of this would be that you would have the money to use or put to interest for three months, and at the expiry of that time would receive the same number of shares for £1 per share less than we now pay you for them." Subsequently the plaintiff handed over the scrip to the defendants, receiving their cheque for £640. On the same day plaintiff received from defendants a contract note as follows:—"Sold to Mr. D. O'Connor, 20 shares Broken Hill Proprietary Company Limited, cum all privileges, each call to date paid up, at £31 each—£620, cum all privileges. Terms cash. Stamp duty.—J. B. NORTH & SON, Principals. E. & O.E. Delivery and payment on 3rd September, 1886." On 3rd September defendants had not in their possession the shares necessary to enable them to carry out the contract. *Held* by the C.J., that the plaintiff was entitled to the relief sought, i.e., specific performance of the contract, whether the contract was one to replace the shares or of sale. *Held*, also, that the contract was one, not of sale, but to replace the shares. *Held*, by the Full Court (reversing the decision of the C.J.), that the plaintiff was not entitled to specific performance of the contract. *Held*, also, that it was unnecessary to determine whether the contract was one of sale or to replace the shares, the real question for the decision of the Court being whether the defendants, not being in possession of the shares for the delivery of which they had contracted, could be compelled to go into the market and buy them for the plaintiff at any price the vendors might choose to ask. *O'Connor v. North*, 9 N.S.W.L.R. (E.), 88. *Windeyer, Stephen and Foster, JJ.* (1887). N.S.W.

**233.—Company—Companies Act, sec. 57—Contract to be filed—Need not be under seal of company.]—**A company was formed to purchase a mine, the purchase money for which was to be paid partly in fully paid-up shares of the company. A copy of the agreement for sale to the company was duly lodged under sec. 57 of the *Companies Act*, but was not executed by the company. *Held*, that the holders of fully paid-up shares were not liable to contribute in the winding-up in respect of such shares. *In re Hidden Star G.M. Co., Pickering's Case*, 10 N.S.W.L.R. (E.), 35. *Owen, J.* (1888).

N.S.W.

**234.—Shares—Sale of—Calls, liability of purchaser for.]—**The registered holder of shares has a right of action against his transferee to recover

calls paid by him in respect of such shares although the transferee may have parted with the shares before such calls were payable, and the transferee has in turn the same right of action against his transferee. *Thompson v. Daunt*, 10 N.S.W.L.R. (L.), 132. *Windeyer, Stephen and Foster, JJ.* (1889). N.S.W.

**235.—Probate duty—Shares in mining company—Mine situated in N.S.W.—Company registered in Victoria—Stamp Duties Acts (46 Vic. No. 3), sec. 48—50 Vic. No. 10—The nature of the property in shares.]—**Probate duty is not payable in respect of shares in a mine, such mine being situated in N.S.W., but incorporated and registered in Victoria. *In re Dalglish*, 10 N.S.W.L.R. (L.), 256. *Windeyer, Stephen and Foster, JJ.* (1889). N.S.W.

**236.—Principal and agent—Broker—Purchase of shares—Misrepresentation—Ratification—Estoppel.]—**A broker, employed by his principal to purchase certain shares in a mining company, informed him, contrary to the fact, that he had purchased such shares in accordance with his instructions. He did not buy till two days later, and he then purchased for forward delivery. *Held*, in an action by the broker to recover commission, that the representation that he had bought put an end to his authority, and that the principal was not bound by the subsequent purchase. *Samper v. Hade*, 10 N.S.W.L.R. (L.), 270. *Darley, C.J., Stephen and Foster, JJ.* (1889). N.S.W.

**237.—Companies Act 1874 (37 Vic. No. 19), secs. 57, 212—Reconstruction—Shares registered—Contract.]—**A company issued 50,000 £1 shares, of which 20,000 were fully paid up, and 30,000 paid up to 10s. per share. It was subsequently agreed to wind up the company, and reconstruct the same, and a liquidator was appointed for the purpose of such winding up, and authorised to consent to the registration of the new company, and to enter into an agreement, then approved, with the new company. A new company, having the same name as the old company, was formed and registered. It was agreed *inter alia* between the new company, the old company, and the liquidator of the old company, that the new company should purchase all the assets and liabilities of the old company, and that every member of the old company should be entitled to receive a fully paid-up share for every share intended to have been fully paid up



in the old company, and a contributing share paid up to 10s. per share, *plus* the amount of calls made and paid for each contributing share in the old company. It was also agreed that if the liquidator, in order to carry the sale into effect, should have to purchase the interest of any member of the old company, the new company should pay to the liquidator such sum as by arbitration between the old company and such member, or by agreement made with the sanction of the new company between him and the liquidator should be determined, but that if it should be necessary for the liquidator to purchase the interests of more than one-third of the old shareholders, the new company was to be at liberty to cancel the agreement. This agreement was carried out, and duly filed with the Registrar of Joint Stock Companies, and consequently A. applied for 200 fully paid-up shares, and 2,000 contributing shares paid up to 18s. per share in the new company, being the number of shares held by him, and the amounts up to which they were credited, and paid respectively in the old company. A winding-up order was subsequently made, and the official liquidator sought to place A. on the list of contributories in respect of these shares, with a liability to pay 20s. on each share, after giving credit for calls made and paid. A. had paid calls amounting to 2s. per share on the 2,000 contributing shares. All the debts and liabilities of the old company had been paid in full. *Held* (affirming *Manning, J.*), that the reconstruction of the old company was not a juggle or a fraud; that a valid contract had been registered within the meaning of sec. 57 of the *Companies Act 1874*, and that A. should not be placed on the list of contributories. *In re New England G.M. Co. Ltd.*, 13 N.S.W.L.R. (E.), 171. *Darley, C.J., Innes and Stephen, JJ.* (1892). N.S.W.

**238.—Action for instalments—Plea of fraud—Pleading—Liquidation.]**—To a declaration for instalments due on certain shares in the plaintiff company against the defendant as the holder of the shares, a plea that the defendant was induced to become a shareholder by the fraud of the plaintiffs is bad for not alleging that the defendant repudiated the shares. The plaintiff company being in liquidation, the liquidator, on behalf of the company, sued to recover instalments on certain shares. The instalments had accrued due before the winding up, and the defendant had not repudiated the shares before

winding up. *Held*, that it was too late to repudiate the shares on the ground of fraud after the winding up, and that the contract to pay the instalments was not determined by the winding up. *Kilkivan Mines (Queensland) Ltd. v. Woods*, 13 N.S.W.L.R. (L.), 301. *Darley, C.J., Innes and Stephen, JJ.* (1892). N.S.W.

**239.—Companies Act 1874 (37 Vic. No. 19), sec. 57—Registered contract—Issue of shares—Contract with trustee.]**—A contract made with a trustee for a proposed company, and registered, and subsequently acted upon by the company after its formation, is a sufficient compliance with sec. 57 of the *Companies Act*. *Hartley's Case*, 10 Ch. 157, followed. Decision of *Manning, J. (supra)*, affirmed. *In re Bonang G.M. Co. Ltd., Brown's Case*, 14 N.S.W.L.R. (E.), 347. *Darley, C.J., Owen and Foster, JJ.* (1893). See 372b, *infra*, *Smith (Official Liquidator of Bonang Co. Ltd.) v. Brown*, (1896) A.C., 614; 65 L.J.P.C., 89; 75 L.T., 213; 45 W.R., 132. Privy Council. N.S.W.

**240.—Principal and agent—Sale of shares—Stock broker.]**—A stock broker buying shares for a disclosed principal is not liable on the contract. *Lane v. Martyn*, 15 N.S.W.L.R., 144. *Darley, C.J., Windeyer and Innes, JJ.* (1894). N.S.W.

**241.—Companies Act (37 Vic. No. 19), sec. 57—Shares issued as paid-up—No registered contract or payment in cash—Extent of liability of shareholder.]**—A shareholder was the registered holder of certain shares in a company issued as fully paid up. No contract was registered under sec. 57 of the *Companies Act*, or money paid for the shares. The company subsequently went into liquidation. *Held*, that his liability upon the shares was limited to a sum sufficient to pay the creditors of the company and the costs of liquidation. *Annandale Copper M. Co. v. Marsden*, 15 N.S.W.L.R. (E.), 158. *Owen, J.* (1894). N.S.W.

**242.—Contract—Evidence—Written contract—Parol evidence—Warranty—False representation.]**—The defendant, through his broker, sold portion of his interest in a mining syndicate to the plaintiff, and the contract was embodied in a sale note stating:—"I have this day sold to G. Campbell one four hundred and eightieth part of my interest in a syndicate, &c." The plaintiff brought an action for breach of the contract, alleging a warranty on the part of the defend-



ant that the one four hundred and eightieth of his interest was equivalent to 250 shares, and that the defendant had refused to transfer 250 shares to him, and tendered evidence of a conversation between himself and the defendant's broker at or before the signing of the contract, in which the broker represented to him that one four hundred and eightieth of the defendant's interest amounted to 250 shares. *Held*, that in the absence of any suggestion of fraud the evidence was inadmissible. *Campbell v. Marpherson*, 16 N.S.W.L.R. (L.), 212. *Darley, C.J., Windeyer and Cohen, JJ.* (1895). N.S.W.

243. — *Calls — Shares — Forfeiture.*] — The articles of association of a company provided that if calls were not paid within a certain time after notice, the shares in respect of which such call was made should be absolutely forfeited. *Held*, that the shares were not *ipso facto* forfeited, but the forfeiture was at the discretion of the directors. *Potosi M. Co. Ltd. v. O'Halloran*, 4 S.A.L.R., 87. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1870). S.A.

244. — *Transfer of shares — Mandamus.*] — Where directors of a mining company refused to register a transfer of shares, the Court *held* on demurrer in an action for *mandamus* for so refusing, that *mandamus* was applicable and would lie to compel a public company to register as transferee of shares. *Fawcett v. Inglewood Mining Venture Ltd.*, 6 S.A.L.R., 15. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1872). S.A.

245. — *Transfer of shares — Mandamus — Direction to jury — Damages.*] — In the trial of above action, *Hanson, C.J.*, directed the jury thus: — "I always took the law to be that if a person goes into a company he can escape his liability by getting rid of his shares; and I shall direct the jury that the plaintiff had a right to have the transfer registered. The jury will find that he was an indigent and impoverished person, and I shall direct them to find for him with 1s. damages, reserving leave to defendants to move to set aside the verdict." *Fawcett v. Inglewood Mining Venture Ltd.*, 6 S.A.L.R., 15 (1872). *Per Hanson, C.J.*, at p. 15 (note), (1871). S.A.

246. — *Contract — Sale of shares — Broker.*] — The defendant being a broker, told B., another broker, that he could let him have some mining shares which he (A.) had purchased from C.,

another broker, at a certain price, net, to himself. B. replied that he would let him know directly, and immediately went to plaintiff, and, as agent for A., verbally sold him the shares at A.'s price, with his own commission added. He returned and informed A. of the sale. A. expressed himself satisfied, and told him to go to C. and obtain the scrip. B. went accordingly, but not being able to obtain it, waited upon the plaintiff with the defendant and C., and introduced the defendant as his principal, and C. as the defendant's seller. Defendant said the matter had been humbugged, but he still hoped to get the shares. The defendant failing, however, for several days to complete, the plaintiff bought the shares at a higher price, and sued for the difference. The Court *held* that there was no evidence of any contract for the sale of the shares by the defendant to the plaintiff. *Wadham v. Wright*, 7 S.A.L.R., 48. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1873). S.A.

247. — *Forfeiture of shares — Articles of Association.*] — By resolution passed at a general meeting of shareholders, the directors of a company were instructed to forfeit all shares tendered to them for forfeiture on which all calls had been paid up to date. Pursuant to these instructions, the directors accepted forfeiture of a number of shares. On the winding up of the company by the Court it was *held* that the above resolution was *ultra vires*, and that the directors could not, without the consent of every member of the company, exercise a power of forfeiting shares where no ground of forfeiture existed, and that the names of the holders of shares removed from the register, pursuant to such resolution, must be included in the list of contributories as existing members of the company. *In re Mattawarrangala Copper M. Co. Ltd.*, 8 S.A.L.R., 137. *Gwynne, J.* (1874). S.A.

248. — *Forfeiture — Shares — Power of directors — Ultra vires.*] — "It appears to me that the meaning of a forfeiture of shares was something done *in invito*; but the matter as presented to the Court assumed more the appearance of a contract, so that while pretending to do one thing, the directors had actually done something of quite a different character." *In re Mattawarrangala Copper M. Co. Ltd.*, 8 S.A.L.R., 137. *Per Gwynne, J.*, at p. 139 (1874). S.A.

249. — *Principal and agent — Money paid — Re-*

quest—Unregistered transfer—Calls.]—Plaintiff, as defendant's agent and his attorney appointed under seal, purchased certain shares in a mining company, and obtained a transfer to himself of the shares, executing a transfer from himself to the defendant—which transfer was also executed by the defendant—plaintiff continued the registered owner of the shares, the transfer to the defendant not being registered. The plaintiff rendered to the defendant half-yearly accounts, charging him with calls paid on the shares. Subsequently the defendant withdrew his power of attorney and papers from the plaintiff. Some fifteen months later a call of £1 per share became payable in respect of the above shares, which the plaintiff was compelled to pay. On action to recover the amount of such call, it was held that the amount could not be recovered as money paid, the plaintiff having taken the shares in his own name without the defendant's authority, and there being no implied request on which to found the action. *Wadham v. Giles*, 13 S.A.L.R., 65. *Way, C.J., Gwynne and Boucaut, JJ.* Common Law (1879). S.A.

250.—Shares—Mining company—Sale—Tender of paid up contributing shares in lieu of promoters' shares.]—A tender of contributing shares even if fully paid up is not a fulfilment of a contract to sell promoters' shares. A purchaser of shares in a mining company has a right to refuse shares tendered if they are not of the exact description he contracts to purchase. *Cornish v. Edwards*, 22 S.A.L.R., 100. *Bundey, J.* (1888). S.A.

251.—Shares—Unregistered transfer in blank—Calls—Liability of transferee to indemnify transferor against calls.]—A transferor of shares in a limited mining company is entitled to be indemnified by a transferee against all calls made subsequent to the transfer, and while the transferor's name appears in the share register, notwithstanding that the transfer is in blank, and the transferee has parted with the shares. *Alexander v. Caro*, 22 S.A.L.R., 134. F.C., *Boucaut and Bundey, JJ.* (1888). S.A.

252.—Mining company—Action for forfeiture of shares—Jurisdiction—District Court (Queensland)—Companies Act 1863 (27 Vic. No. 4)—Goldfields Act 1874 (38 Vic. No. 11), sec. 82.]—The complainant in an action testing the legality of the forfeiture of shares in a gold mining company should take his proceedings in the Supreme

Court under the *Companies Act 1863* (27 Vic. No. 4). The District Court has no jurisdiction given to it by the *Goldfields Act 1874* (38 Vic. No. 11), or otherwise, to entertain such an action. *South New Zealand G.M. Co. v. Bullen*, 1 Q.L.J., 50. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1881). Q.

252a.—Calls—Forfeiture of shares—Companies Act 1863 (27 Vic. No. 4), sec. 25, Table A.]—The articles of association of a company contained a clause that if any member failed to pay a call within seven days, he should by mere default alone, and without any proceeding on the part of the company, cease to be a shareholder. A shareholder having made such default was sued for calls due. Held, that the shares could be forfeited only at the option of the directors, and no such option having been exercised, the shareholder remained liable. *Great Monkland Tribute Co. Ltd. v. Trueman*, 6 Q.L.J., 112. *Griffith, C.J.* (1894). Q.

252b.—Shares—Forfeiture—Damages.]—An action for damages will lie by a shareholder against a company for wrongful forfeiture of shares, although no equitable relief is claimed. *Cashman v. 7 North Golden Gate G.M. Co. Ltd.*, 7 Q.L.J., 99. *Chubb, J.* (1896). Q.

253.—Transfer of shares in company—Blank in document—Forgery.]—An indictment for forging and uttering a transfer of shares in a joint stock mining company is not supported by production of a blank transfer in the form given by the *Joint Stock Companies Act 1860* (N.Z.), (24 Vic. No. 13), but not containing the name of the transferee, although in practice such documents had been usually taken and acted upon as transfers. *Reg. v. Smale*, 2 N.Z.C.A., 22. *Arney, C.J., Johnston, Gresson, Richmond and Chapman, JJ.* (1872). N.Z.

254.—Transfer of shares—Forgery—Registration—Estoppel.]—The plaintiff having bought and paid for fifty shares in the defendant company, received a transfer therefor purporting to be executed by the owner of the shares. This transfer was forwarded to the company's office and was registered by them, the name of the seller removed from the register of shareholders and the plaintiff's name substituted. Afterwards it was discovered that the transfer was a forgery, and the company removed plaintiff's name from the register, refused to receive a cheque for-

warded by him for a call, and refused to restore his name to the register. *Held*, that the company having registered the plaintiff, and he having acted on the registration by forwarding his cheque, the company was estopped from denying that he was a shareholder, and was not justified in removing his name from the register and refusing to replace it. *Watt v. Central Italy G.M. Co.*, 2 N.Z.J.R., 16. N.Z.

**255. — Forfeiture of shares — Necessity for declaration of forfeiture — Estoppel — Wrongful removal from register — Measure of damages.] —** Plaintiff was a director of a mining company when a call was made and notice of it given, and afterwards when notice was given to certain shareholders, including himself, that unless the call was paid by a certain date their shares would be forfeited. He did not pay the call, and a few days after the date fixed by the last notice he resigned his position as director. Subsequently the directors passed a resolution that the plaintiff's shares, being forfeited, should be sold, and they afterwards removed his name from the register. At this time the shares were unsaleable, but four months afterwards they became of considerable value, when plaintiff claimed them, and tendered all calls. The directors then passed a resolution declaring the calls forfeited. Plaintiff brought an action for wrongful removal of his name from the register. *Held*—(1.) That no declaration of the forfeiture having been made, the directors had no right to remove the name of the plaintiff from the register. (2.) That, while the conduct of the plaintiff might have formed a good equitable plea if he had sought equitable relief, it did not amount to an estoppel in law to prevent his disputing the right of the defendants to remove his name from the register; and (3.) That the measure of damages, by analogy to cases of trover, must be taken to be the value of the shares at the time of their conversion, i.e., at the date of the removal of plaintiff's name from the register. Judgment for ls. and costs. *Greenwood v. Crown Prince G.M. Co.*, 1 N.Z.J.R. (N.S.) S.C., 41. N.Z.

**256. — Shares — Equitable assignment.] —** A shareholder who equitably assigns his shares is, so far as regards the legal title to the shares, a trustee for his assignee. *Malcolm and Michie v. United Copper M. Co.*, N.Z.L.R. 4 S.C., 16. *Richmond, J.* (1885). N.Z.

**257. — Transfer of shares — Notice of prior equitable assignment.] —**There is nothing in the N.Z. *Mining Companies Act* 1872 (36 Vic. No. 33), which gives a transferee of shares an absolute registered title, unaffected by notice of trusts or equitable encumbrances. *Malcolm and Michie v. United Copper M. Co.*, N.Z.L.R. 4 S.C., 16. *Richmond, J.* (1885). N.Z.

**258. — Shares — Transfer of by sheriff after seizure and sale—Registration.] —**The sheriff has a right to seize and sell shares, the property of a judgment debtor, and for this purpose can compel the registration of his transfers without production of the share certificates. *Malcolm and Michie v. United Copper M. Co.*, N.Z.L.R. 4 S.C., 16. *Richmond, J.* (1885). N.Z.

**259. — Transfer of shares — Notice of prior equitable assignment—Rectification of register.] —**An equitable encumbrance on shares may be enforced against a registered transferee of them with notice of the encumbrance by an application to rectify the register. *Malcolm and Michie v. United Copper M. Co.*, N.Z.L.R. 4 S.C., 16 (1885). N.Z.

**260. — Transfer of shares by sheriff after seizure and sale—Registration—Notice of prior equitable assignment — Bona fide purchaser without notice.] —**A shareholder in a mining company gave a bank an equitable mortgage over his shares with an irrevocable power of attorney to sell, and notice of this assignment was given to the company. The sheriff, acting under a distress warrant upon a judgment recovered against the shareholder by a creditor, subsequently purported to seize and sell the shares; transfers of the shares were registered, and the purchasers placed on the books of the company as the registered shareholders. At the sale a formal notice of the assignment to the bank was read aloud in the presence of the purchasers of the shares. One of the purchasers at the sale subsequently resold his shares to one S., who had no notice of the bank's claim: *Held*, that the sale by the sheriff passed to the purchasers the shareholder's interest and the legal estate in the shares, but subject to the bank's equitable assignment, and that S. being a *bona fide* purchaser without notice, was protected by the legal estate passing to him by the sheriff's transfer, and by registration; and *semble*, that the company was bound by the notice of the bank's assignment, and should not have regis-

tered the sheriff's transfers. *Malcolm and Michie v. United Copper M. Co.*, N.Z.L.R. 4 S.C., 16. *Richmond, J.* (1885). N.Z.

**261.—Shares—Transfer of in blank—Stamps** Act 1882 (N.Z.), (46 Vic. No. 16), sec. 132.]—Where a transfer of shares in a mining company is signed by the seller before the purchaser's name is inserted therein, and the agent of the seller some time afterwards fills in the name of the purchaser, the transfer is void under sec. 132 of the *Stamps Act* 1882. *North v. Grose*, 6 N.Z.L.R., 709. *Williams, J.* (1888). N.Z.

**262.—Application for shares—Allotment—Company not constituted—Registration—Removal from register.]**—Where application is made to "directors" of a proposed company for shares in the company to be accepted subject to the rules thereof, and at the date of the allocation of shares the company is not constituted, and has neither directors nor rules, and the applicant after formation of the company does nothing to commit him to the acceptance of the shares standing in his name, he is entitled to have his name removed from the register of shareholders. *In re Wareatea G.M. Co. Ltd., ex parte Nahr*, 7 N.Z.L.R., 89. *Williams, J.* (1888). N.Z.

**263.—Repudiation of shares—Misrepresentation—Laches.]**—A person who has a right, on the ground of misrepresentation, to have his name removed from the register of shareholders of a gold mining company, loses that right if he delays for upwards of three months after such misrepresentation becomes known to him to apply to the Court for the purpose of having his name removed. Threats of legal proceedings in the meantime, and strenuous efforts to induce the company to remove the name from their register, will not suffice to keep the right alive. *In re Nenthorn Consolidated G.M. Co. Ltd., Clement's Case*, 9 N.Z.L.R., 233. *Williams, J.* (1890). N.Z.

**264.—Mining Companies Act 1886 (N.Z.), (50 Vic. No. 19), secs. 54, 55—Action for calls on forfeited shares—Shares unsaleable.]**—Where a call has been made in respect of shares in a company incorporated under the *Mining Companies Act* 1886 (50 Vic. No. 19), and these shares have been forfeited for non-payment, and afterwards, when put up to auction, are found to be unsaleable, and the company goes into liquidation, the liquidator may, at any time, sue the forfeitor

for the full amount of the call. Sec. 55 imposes a liability upon the forfeitor in addition to the liability imposed by sec. 54. The difference between the Victorian and New Zealand Acts on the subject discussed in the judgment. *Liquidator of Victoria Q.M. Co. v. Kerr*, 11 N.Z.L.R., 20. *Williams, J.* (1891). N.Z.

**265.—Forfeiture of shares under earlier or later call—Rectification of register.]**—An application to place the name of a contributory on the list of contributories in respect of a call made at an earlier date than the call in respect of which the name appears on the list is, in effect, an application to rectify the register, and the Court in dealing with such application will go into the facts of the case, and treat the register as if it contained the entries which, upon the facts, ought to have been made therein from time to time. *In re Nenthorn Consolidated Q.M. Co., McRae's Case*, 11 N.Z.L.R., 408. *Williams, J.* (1892). N.Z.

**266.—Forfeited shares—Redemption—Alteration of register.]**—Where a forfeiting shareholder gives a promissory note, and the conduct of giver and taker shows that it was given and taken for the purpose of redeeming forfeited shares, and, in consequence, the name of the forfeitor remains on the register till the company goes into liquidation, he is not entitled to have the register altered, or to say that his liability is other than the register discloses. *In re Victoria Q.M. Co., Edmond's Case*, 11 N.Z.L.R., 416. *Williams, J.* (1892). N.Z.

**267.—Shares—Decree to transfer—Non-compliance—Attachment.]**—See ATTACHMENT.

**268.—Shares—Sale of—Principal and agent—Forfeiture—Parties.]**—See COMPANY, 200.

**269.—Vesting order—"Stock" including "shares."]**—See PRACTICE (VESTING ORDER).

**270.—Shares—Non-delivery of—Broker's duty to client—Discovery.]**—See PRACTICE, 477.

**271.—Mining company—Action for forfeiture of shares—Jurisdiction of Queensland District Court.]**—See PRACTICE, 229.

**272.—Transfer of shares in company—Blank in document—Forgery.]**—See CRIMINAL LAW.

## XXI.—TRIBUTE.

See TRIBUTE.

**273.—Mining Companies Act 1871 (No. 400),**

**sec. 131—Letting of mine on tribute.]—**Sec. 131 of the *Mining Companies Act 1871* (No. 409), prohibiting the "letting" of a mine on tribute without the sanction of the shareholders, does not apply to a tribute agreement which does not amount to a demise of the land. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 127. F.C., *Stawell, C.J., Molesworth and Williams, JJ.* (1881-2). V.

**274.—Mining Companies Limited Liability Act 1864 (No. 228)—Mining Companies Act 1871 (No. 409), sec. 124—Mining Amendment Act 1872 (No. 446), sec. 7—Letting mine on tribute.]—**All companies registered under the *Mining Companies Limited Liability Act 1864* (No. 228), and not registered as "no-liability" companies under the *Mining Companies Act 1871* (No. 409), are by virtue of sec. 124 of that Act brought under Part I. of that Act; and therefore sec. 7 of the *Mining Amendment Act 1872* (No. 446), prohibiting the making of tribute agreements except with the consent of the shareholders, applies to such companies. *Reg. v. McDougall*, 3 V.R. (L.), 66; and *Tommy Dodd Co. v. Patrick*, 5 A.J.R., 14, over-ruled. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C., *Stawell, C.J., Molesworth and Williams, JJ.* (reversing *Higinbotham, J.*), (1881-2). V.

**275.—Authority of manager to make tribute agreement.]—**The manager of a mining company incorporated under the *Mining Companies Limited Liability Act 1864* (No. 228), has no inherent authority to bind the company by an agreement for letting a portion of its land on tribute. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C., *Stawell, C.J., Molesworth and Williams, JJ.* (1882). V.

**276.—Tribute agreement with company—Sanction of shareholders.]—**Where a Statute expressly prohibits a company from entering into a tribute agreement, unless with the sanction of a general meeting of the shareholders, a person entering into such an agreement with the manager or directors is bound to inquire whether such sanction has been duly given. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C., *Stawell, C.J., Molesworth and Williams, JJ.* (1882). V.

## XXII.—ULTRA VIRES.

See COMPANY (DIRECTORS, MEMORANDUM OF ASSOCIATION, OBJECTS).

**277.—Mortgage—Antecedent debt.]—**A company constituted under the Act No. 228 possesses the powers given by the Act, and none other. A company so constituted has no power to mortgage its plant and machinery for an antecedent debt. *M'Kean v. Cleft in the Rock G.M. Co. Regd.*, 5 W.W. & A'B. (L.), 42. Banco (1868). V.

**278.—Act No. 228, sec. 39—Rules—Deed—Estoppel—Waiver—Acquiescence—Calls.]—**The Act No. 228, sec. 39, provides that rules of a company, registered under its provisions, and made after incorporation, shall be made only at an extraordinary meeting of the company. A company registered under the Act made rules at an ordinary meeting in the form of a deed of partnership, executed by some but not all the shareholders. A shareholder who executed this deed was sued for calls made in accordance with it. It was contended, on behalf of the defendant, that the rules were invalid, inasmuch as they had not been passed at an extraordinary meeting. *Held*, that the rules were for this reason in direct violation of the Act; that the defendant was not estopped by his execution of the instrument from taking this objection; and that his execution of it was not a waiver of formalities imposed by the Act. *Quære*, whether if all the shareholders had executed the deed, the result would have been different. (*Seemle*, that it would not; *Hassal v. Crenwick Grand Trunk Co.*, A.R., 20th May, 1868). *Ballarat and Chiltern G.M. Co. v. Roberts*, 1 A.J.R., 142. Banco (1870). V.

**279.—Act No. 228, sec. 25—Mortgage—Covenant to pay a past debt.]—**A company registered under the Act No. 228, cannot give a valid mortgage of its plant and tools of trade to secure a past debt, and a covenant in such a mortgage to pay the debt is equally invalid and cannot be sued upon. *Quære*, as to the effect of a covenant to pay the debt, if contained in a separate deed from the mortgage. *Commercial Bank v. Grassy Gully Co.*, 2 A.J.R., 18. Banco (1871). V.

**280.—Mortgagor—Antecedent debt—Act No. 228.]—**A company registered under the Act No. 228, may give a valid mortgage over their plant to secure the repayment of a sum of money, portion of which had been advanced subsequently. *Seemle*, that such a mortgage is not a mortgage for an antecedent debt within the meaning of the judgment in *M'Kean v. Cleft in the Rock G.M.*

*Co. Regd.*, 5 W.W. & A'B. (L.), 42, *supra*.  
*Commercial Bank v. McDonald*, 2 A.J.R., 120.  
*Banco* (1871). V.

**281.—Contract in writing—Acquiescence.]—**  
 W. and two other persons were trustees for the  
 Band of Hope Company Registered, of a lease  
 from the Crown for fifteen years of some land at  
 Sandhurst. T. asked W. for permission to build  
 a house on a portion of the land. W. said he  
 had no objection. T. had a conversation with  
 some of the directors about it, and as no objec-  
 tion was made, he built a house on the land.  
 Afterwards he was asked to sign an agreement  
 with the directors respecting the house, but no  
 arrangement was arrived at. Ultimately the  
 trustees brought a suit in the Court of Mines  
 against T. for trespass. On case stated for the  
 opinion of the Chief Judge: *Held*, that the  
 company was not bound, as there was no docu-  
 ment under seal, or writing of any sort, that  
 there was no bargain which could be specifically  
 enforced, and that the defendant T. had no  
 defence to the suit either in law or equity.  
*White v. Tippett*, 3 A.J.R., 107. *Molesworth*,  
*J.* (1872). V.

**282.—Companies Act 1890 (No. 1074), secs.**  
**234, 235—Bill of sale by mining company to**  
**secure past debt—Power of company to give.]—**  
 The absence of a resolution passed at an extra-  
 ordinary meeting of the company, in terms of  
 sec. 234 of the *Companies Act* 1890 (No. 1074),  
 does not affect the validity of a bill of sale given  
 by a mining company to secure a past debt.  
*Price v. Old Q.G.M. Co.*, 2 A.L.R., 13. *Hol-*  
*royd, J.* (1896). V.

**283.—Agreement ultra vires—Directors hand-**  
**ing over the control of company's business.]—**  
 Corporations cannot give up to others their  
 special powers or the control of their under-  
 takings unless authorised to do so by their con-  
 stituting instrument or by statute. The defend-  
 ants, a coal company, entered into an agreement  
 with a number of other coal companies with a  
 view to forming an association for the purpose  
 of taking joint action against the trades unions  
 of their employes, and also of preventing capric-  
 ious fluctuations in the price of coal. Under the  
 agreement each company nominated a repre-  
 sentative, and the representatives so nominated  
 formed the board of the association. It was  
 provided in the agreement that the board should

have cognisance of all matters in any way affect-  
 ing the trade or interest of the association; that  
 the board should from time to time fix the price  
 of coal; that the members of the association  
 could sell their coal without restriction as to  
 quantity, but if the sales of any member should  
 exceed the estimated amount, then such member  
 was to pay so much per ton to the association.  
*Held*, that it was *ultra vires* of the defendant  
 company to become a party to this agreement,  
 as by the agreement the company gave up the  
 entire control and management of its business to  
 this association, and there was nothing in the  
 articles of association of the company which  
 justified such a course. *Brown v. Wickham Coal*  
*Co.*, 15 N.S.W.L.R. (L.), 306. *Darley, C.J.*,  
*Innes and Stephen, JJ.* (1894). N.S.W.

**284.—Directors handing over the control of**  
**company's business — Restraint of trade.] —**  
*Quere*, whether such a deed is not opposed to  
 public policy as being in restraint of trade, and  
 therefore void. *Brown v. Wickham Coal Co.*,  
 15 N.S.W.L.R. (L.), 306, at p. 311. *Darley*,  
*C.J.*, *Innes and Stephen, JJ.* (1894). N.S.W.

**285.—Mining Companies Act 1886 (N.Z.), (50**  
**Vic. No. 19)—Borrowing powers of company.]—**  
*Per Williams, J.*:—A mining company has not,  
 under the *Mining Companies Act* 1886 (50 Vic.  
 No. 19), any power to borrow except in the  
 manner provided by sec. 66 of that Act. *Bank*  
*of New Zealand v. Rose*, 10 N.Z.L.R., 484 (1891).  
 N.Z.

**286.—Mining Companies Act 1886 (N.Z.), (50**  
**Vic. No. 19), sec. 66—Purchase of battery by**  
**three companies — Joint use — Management of**  
**joint committee — Validity of arrangement—**  
**Advances by bank—Subrogation—Creditors of**  
**joint committee—Joint and several liability of**  
**companies.]—**The N. company, the V. company  
 and the B. company (three mining companies  
 registered under the *Mining Companies Act* 1886  
 [50 Vic. No. 19], which had each adopted the  
 rules given in the schedule to that Act) entered  
 into an agreement by deed for the purchase and  
 erection, upon ground belonging to one of them,  
 of a quartz-crushing battery for the use of the  
 three companies jointly. The agreement pro-  
 vided that the battery should be the property  
 of the three companies in equal shares; that all  
 expenses of the purchase, transit, erection, work-  
 ing and managing of the battery should be borne  
 by the companies in equal shares; that, subject

to the provisions of the agreement, the sole management and exclusive control of the battery should be vested in a committee of six persons to be made up by the directors of each company annually electing two of their number to be members of it; that the battery should be used exclusively for crushing for the companies themselves unless the directors of each company should otherwise resolve; that each company should pay the committee for its own crushing and wear and tear; that all moneys to be received by the committee should be paid into an account to be operated upon by the chairman and secretary of the committee on a resolution of the committee; and that the agreement should remain in force for fifteen years. The committee appointed under this agreement, and a manager appointed by the committee under its provisions, incurred liabilities for the erection and working of the battery. To enable it to meet these liabilities each company paid moneys from time to time to the credit of the bank account of the committee, and the committee discharged the liabilities out of the moneys so paid. The moneys paid by the companies to the committee were paid by cheques upon the accounts of the companies with the appellant bank, which were in each case overdrawn, without the necessary authority to borrow under sec. 66 of the *Mining Companies Act* 1896, having been obtained. *Held*, that the agreement between the companies was *intra vires*, that the liabilities incurred by the committee were joint and several liabilities of the companies, and that the bank was entitled to subrogate to the claims of those who had been paid by the committee, and prove for such claims against the companies, jointly and severally, on their liquidation. *Bank of New Zealand v. Rose*, 10 N.Z.L.R., 484. C.A., *Prendergast, C.J., Denniston and Connolly, JJ.* (reversing *Williams, J.*), (1891). N.Z.

### XXIII.—VOTES.

287.—*Proxies.*]—Bill against defendants to prevent them, the company, directors, trustees, and legal manager from disposing of the property of the company. The rules provided for the use of proxies. At the meeting at which the resolution for the sale of the company's property was adopted, proxies were tendered against the resolution and refused, and the resolution carried.

*Held*, that the resolution was carried contrary to the wishes of the majority if the proxies had been allowed, as they ought to have been, and that it was not binding on the plaintiffs and the other dissentients. Injunction granted to restrain from selling under the resolution. *Hick v. Havilah Co.*, 4 W.W. & A'B. (E.), 87. *Molesworth, J.* (1867). V.

288.—*Proxies—Rules—Act No. 228, sec. 39—Directors—Calls.*]—Proxies cannot be used at meetings of companies unless they are allowed by the rules or Act under which the company is constituted. *Held*, that rules made under Act No. 228, sec. 39, by a majority in number and value when proxies were used to make up the number, and calls made by directors appointed under such rules, were invalid. *Higgett v. Sun Q.M. Co.*, 4 A.J.R., 119. Banco (1873). V.

### XXIV.—WINDING UP.

289.—*Contribution—Limitation of action.*]—H. was sued by the liquidator appointed to wind up a mining company, formed under 18 Vic. No. 42, for calls. He was sued also for the same amount as contribution or unpaid capital. *Held* (*Molesworth, J.*, dissenting), that as the manager could have sued for the calls, and the time for bringing a complaint to recover them before the magistrate under 11 and 12 Vic. c. 43, sec. 11, had elapsed, the liquidator was barred. The time which had begun to run for the amount as calls, could not be said not to have run for the same amount as unpaid capital. *Melville v. Higgins*, 1 W. & W. (L.), 306. Banco (1862). V.

290.—*Validity of order—Official liquidator.*]—Before an order for winding-up under 18 Vic. No. 20, sec. 14, could be obtained, process and not a judgment or verdict should be served on the judgment debtor by the judgment creditor, or his lawfully authorised agent. Where a copy of the judgment only had been served, the winding-up order was invalid, and the official agent had no power to sue under it. *Wilson v. Broadfoot*, 2 W. & W. (L.), 96. Banco (1863). V.

291.—*Official liquidator—Right to sue for unpaid capital.*]—The right of an official liquidator to sue for unpaid capital under 18 Vic. No. 42, arose on his appointment. The right to sue was subject to the limitation as to time contained in



11 and 12 Vic., c. 43, sec. 11. *Broadfoot v. O'Farrell*, 2 W. & W. (L.), 102. Banco (1863). V.

**292.—Discretion in granting order.]**—It is discretionary with the Court whether it will grant an order for winding up under the provisions of the *Companies Statute* 1864. On the hearing of a petition for winding up a company under that Act, a person, neither a creditor or a shareholder of the company, is not entitled to be heard. *In re St. Kilda and Brighton Railway Co.*, 1 W.W. & A'B. (E.), 157. *Molenworth, J.* (1864). V.

**293.—Contribution—Unallotted shares.]**—H. was a member of a mining company, registered. New shares were issued, of which thirty-five were unallotted; of these H. agreed to take two, but no scrip was ever issued to him for them, nor were they registered in his name. They were held in trust by S. for the company. *Held*, that as S. was the legal owner of the shares, and H. only the *cestui que trust*, the official agent could not recover contribution from H. on those shares. *Carver v. Harris*, A.R., 24th June, 1865. V.

**294.—Jurisdiction of justices.]**—The jurisdiction of justices under the Act No. 228, sec. 37, is not repealed by the *Justices of the Peace Statute* (No. 267). *Eaglesome v. Carver*, A.R., 12th Dec., 1865. V.

**295.—Conditional order, bad.]**—A conditional winding-up order was held to be bad, under 27 Vic. No. 228, secs. 30 and 31, the Act not authorising such an order. The objection may be taken before justices in a complaint for contribution. *Haigh v. Hart*, 3 W.W. & A'B. (L.), 123. Banco (1866). V.

**296.—Proof of claim.]**—The directors of a mining company, registered under Act No. 228, borrowed money from a bank, without having been authorised by an extraordinary meeting of the shareholders under sec. 21. *Held*, that the company was responsible, and that the bank should be permitted to prove its claim. *Re Tyson's Reef, ex parte Holmes*, 3 W.W. & A'B. (L.), 162. Banco (1866). V.

**297.—Order must show jurisdiction—Capital.]**—*Held*, that an order for winding up a company under the Act No. 228, must show the matters necessary to give the judge jurisdiction under

the Act to make it. In a proceeding to recover contribution of "additional capital," it is necessary to prove that a majority in number and value sanctioned the increase, as required by the Act. *Campbell v. Carver*, 4 W.W. & A'B. (L.), 48. Banco (1867). V.

**298.—Hearing—Order ex parte—Jurisdiction—Official agent.]**—*Held*, that the words "upon the hearing of any petition," in 27 Vic. No. 228, sec. 30, meant a hearing on notice to the company which was sought to be wound up; that a winding-up order made on the *ex parte* application of a creditor was bad, and that the winding-up order must show, on the face of it, everything necessary to give the judge jurisdiction to make it. *Dobson v. Turner* (unreported), 27th June, 1867. V.

**299.—Official agent.]**—Under the Act No. 228, the official agent had no power to sue for contribution in his own name. *Clarke v. Turner* (unreported), 2nd July, 1867. See Act No. 324, secs. 3, 5, 6. V.

**300.—Invalid order.]**—The *Mining Companies Limited Liability Amendment Act* (No. 324), has no retrospective effect to make valid, invalid orders made before the passing of the Act. *Re Perseverance Quartz Co. Regd.*, A.R., 13th Sept., 1867. V.

**301.—Winding up—Unauthorised disposal of property.]**—Where a company is registered under the Act No. 228 its rules are valid so far only as they are not inconsistent with the enactment. The Act authorises a winding up, and points out the manner in which it should be done. A company by its rules cannot provide for winding up in a manner different to that contemplated by the Act. A company cannot sell the whole of its property; it can only wind up. A sale by the company of all its property is not authorised, and is invalid. *Creswick Grand Trunk Co. Regd. v. Hassall*, 5 W.W. & A'B. (E.), 49. F.C. (1868). V.

**302.—Set-off—Contribution.]**—To a complaint before justices by the official agent for contribution, the defendant pleaded by way of set-off a promissory note of the company for £205. *Held*, that the justices had no jurisdiction to entertain the set-off, as it was not one of the causes of action prescribed by sec. 41 of the *Justices Statute*. *Semble*, that no set-off to such a complaint could



be made under the Act No. 228. *Wynne v. Barnard*, 5 W.W. & A'B. (L.), 35. Banco (1868). V.

**303.—Winding up order may be set aside.]—**Under Act No. 324 a judge of the Court of Mines may set aside an order for winding up a mining company, on the application of a shareholder, he being a "person interested in the said order." *Lady Don G.M. Co., ex parte Hitchens*, A.R., 6th April, 1868. V.

**304. — Transfer unregistered in company's books.]—**A shareholder in a company, registered under Act No. 228, arranged with the manager to put to the credit of his call account a certain amount for goods supplied by him to the company. The manager did not place the amount to his credit as promised. The shareholder subsequently *bona fide* transferred his shares, and forwarded them to the company to have the transfer completed. The directors promised to transfer them but did not. An order was obtained to wind up the company. The official agent sued the defendant for contribution as his name appeared as a shareholder in the register. *Held*, that he was not liable, as he had ceased to be a shareholder within the prescribed time. *O'Donovan v. O'Farrell*, 5 W.W. & A'B. (L.), 169. Banco (1868). V.

**305.]—Company under Act No. 228 cannot be wound up under Act No. 190.]—**A company, formed under the *Mining Companies Limited Liability Act 1864* (No. 228), is not liable to be wound up under the *Companies Statute 1864* (No. 190). *Re Collingwood Q.M. Co. Regd., ex parte Colonial Bank*, 5 W.W. & A'B. (E.), 190. *Molesworth, J.* (1868). V.

**306.—Contribution.]—**A complaint for contribution, brought by an official agent against a shareholder in a company ordered to be wound up, was dismissed by the justices on the ground that the company had not published their accounts in accordance with sec. 17 of Act No. 228. *Held*, on appeal, that the provision was directory merely, that the objection was frivolous, and that the appeal should be allowed. *Hart v. Marks*, A.R., 25th Nov., 1868. V.

**307.—Validity of order.]—**A winding up order made under the Act No. 228, must purport to be made by the judge of the Court of Mines for the district in which the company is registered. *Turner v. Behrens*, A.R., 28th Nov., 1868. V.

**308.—Limitation of action.]—**An official agent of a mining company registered under Act No. 228, suing shareholders for contribution, before justices, must bring his complaint within twelve months from the date of the winding-up order. *Hart v. Garden*, 5 W.W. & A'B. (L.), 213. Banco (1868). V.

**309.—Act No. 228, sec. 23 — Mining district —To which judge petition for winding up to be presented.]—**The Act No. 228, sec. 23 provides that an application for winding-up a company registered under its provisions, is to be made to the judge of the Court of Mines of the district wherein such company is registered. The Britannia and Eldorado Gold Mining Company was registered in the mining district of Beechworth, holden at Sale, which place was at that time within the Beechworth district. Subsequently, the Gippsland Mining District, which had previously been part of the Beechworth district, was constituted. The ground worked by the company was within the Gippsland Mining District. A petition was presented to the judge of the Gippsland district at Sale to wind up the company, and a winding-up order was made by him. On an application to the Supreme Court for a prohibition to the judge from further proceeding, it was held that although the company had been originally registered in the Beechworth district, the petition had been presented to the right judge, and that he had jurisdiction. *Re Britannia and Eldorado G.M. Co., Regd.*, A.R., 25th June, 1868. V.

**310.—Calls—Payment by promissory note—Directors—Official agent.]—**B. was summoned by the official agent for £10 contributions, on ten shares held by him in the New Lady Don Gold Mining Company, Registered. One-half of the amount so sued for had been paid by the defendant to the company, as payment of certain calls, the ninth, tenth, and eleventh, made by the directors of the company. There was a large portion of the ninth call unpaid when the other calls were made, and it was contended on behalf of the complainant that therefore the calls made subsequently to the ninth were illegal, and that the defendant had paid them in his own wrong; and further, that even if they had been properly made, the directors had no power to take promissory notes in payment, as they had done in this case. The justices concurred in this view, and made an order for the amount. *Held*, on

appeal, that in these cases the directors represent the company, and that the official agent stands in no better position than the company. As the company had received the money it could not sue for it again. The appeal was allowed without costs. The verdict to be reduced by five pounds, the amount of the call paid. *Reeves v. Brown*, 6 W.W. & A.B. (L.), 85. Banco (1869).

V.

**311.—Official agent—Right to sue in Equity—Attorney-General.]**—An official agent, under Act No. 228, sec. 27, and Act No. 324, sec. 6, has a right to institute a suit in Equity in his own name, against the directors of the company, for the winding up of which an order has been obtained, for having received more funds than they accounted for and for refusing to account. *Semble*, that a bill for having improperly paid dividends out of capital is demurrable. In such a suit the Attorney-General is not a necessary party. *Reeves v. Croyle*, A.R., 23rd June, 1869.

V.

**312.]**—It is necessary that the shareholders who received the dividends should be made parties to the suit. *Ibid*, 6 W.W. & A.B. (E.), 302; 1 A.J.R., 109; N.C., 28. F.C. (1869).

V.

**313.—Payment under a bad winding-up order—Bad order treated as a nullity—Act No. 324, sec. 3—Certificate of clerk of Court of Mines—Mining Statute 1865, sec. 169.]**—A bad winding-up order made by a judge of a Court of Mines under the Act No. 228, is a nullity, and it may be so treated without having it set aside under the Act No. 324, sec. 3. A shareholder who pays under such an order pays at his own peril, and is still liable for the full amount of his contribution under a valid winding-up order subsequently obtained. *Semble*, that a certificate given by a clerk of a Court of Mines under the *Mining Statute* 1865, sec. 169, does not estop parties from showing that the Court of Mines had not jurisdiction over the subject matter of the proceedings to which the certificate refers, and that the order made in such proceedings is bad in law. *Reeves v. Bowden*, 6 W.W. & A.B. (L.), 218; N.C., 17. Banco (1869).

V.

**314.—Act No. 228, sec. 36, sub-sec. 1—Commencement of winding up.]**—The Act No. 228, sec. 36, sub-sec. 1, provides that no past shareholder shall be liable to contribute to the assets of the company if he has ceased to be a shareholder for a period of three months or upwards

prior to the commencement of the winding up. *Held*, that the three months are to be reckoned from the presentation of the petition to obtain a winding-up order, and not from the date of the order itself, and that the commencement of the winding up is the presentation of the petition. *Reeves v. Millsom*, 1 V.R. (L.), 15; 1 A.J.R., 28. Banco (1870).

V.

**315.—Act No. 228—Costs of winding-up order—Order bad in part and good in part—Act No. 324, sec. 3—Notice—Form of order—Evidence Statute, sec. 54.]**—A winding-up order made by a judge of a Court of Mines, under the Act No. 228, containing an order against the company to pay the costs of the petition, although bad as to the costs, the judge having no power to order them, may be good in other respects and may be enforced. The order must purport to be signed within the place where the judge who signed it had jurisdiction. An application for winding up may be made upon notice served as directed by Act No. 324, sec. 3. The form of a winding-up order, given in the Schedule to Act No. 324, sec. 7, ought to be followed as closely as the circumstances of the case will permit. The omission of the words “judge of the said Court of Mines,” after the judge’s signature to a winding-up order, is cured by the *Evidence Statute*, sec. 54, which provides that judicial notice is to be taken of the signature of a judge of a Court of Mines, when such signature is attached to any decree, order or other judicial or official document. *Walker v. Jenkins*, 1 V.R. (L.), 9; 1 A.J.R., 25. Banco (1870).

V.

**316.—Act No. 228, sec. 38—Enforcing contribution by warrant.]**—An official agent having obtained judgment against a shareholder in a company, wound up under the Act No. 228, applied to a magistrate for a warrant of distress to recover the amount under sec. 38. In support of the application he made an affidavit that the whole sum was required by him for the purpose of the Act, regard being had to the contributions of other persons. The magistrate refused to issue the warrant, unless a summons was first issued, calling upon the defendant to show cause why a warrant of distress should not issue against him. A *mandamus* to compel the magistrate to issue the distress warrant was refused on the ground that it did not sufficiently appear that the magistrate was satisfied that the money was required for the payment of the company’s

debts. If it had been shown to the Court that the magistrate was satisfied that the money was required, a *mandamus* might have been granted. *Reg. v. Gaunt*, 1 A.J.R., 36. Banco (1870).

V.

**317. — Act No. 228 — Surrendering shares — Liability.]**—H., a shareholder in a company registered under the Act No. 228, was sued by the official agent for the amount of uncalled capital due on his shares. The order to wind up the company was made on the 12th October, 1869. H. was registered in the books of the company as the holder of shares till the 6th of May, 1868. On that day he surrendered his shares to the company. At the time of the surrender £1 5s. per share remained uncalled. *Held*, that the surrender did not release H. from his liability. *Reeves v. Highett*, 1 V.R. (L.), 110; 1 A.J.R., 84. Banco (1870).

V.

**318. — Transfer — Bona fides — Act No. 228 — Shareholder.]**—“This action was brought by the official agent of a company in process of winding up. He sued the defendant, as a shareholder, for calls in the form of contribution. The defence was that Bonneau had transferred his shares and was not liable, the time prescribed by the Act having expired since the transfer, and before this action was brought. In point of fact the company appeared to have recognised the transfer as valid. The transfer was duly registered in the books, and Bonneau apparently ceased, according to the registration books kept by the company, to be any longer a shareholder; and the scrip certificate contained an indorsement of cancellation by the proper authorities. The sole question therefore was, was the transfer *bona fide*? No doubt there was evidence both ways. Whether it was honestly made or *bona fide* is simply a question for the magistrates acting as jurors. They found that it was—and that is a matter of fact and not of law.”—*Per Stawell, C.J.* Appeal against order of magistrates dismissed. *Reeves v. Highett and Bonneau*, 1 V.R. (L.), 110; 1 A.J.R., 116. Banco (1870).

**319. — Winding up — Act No. 228, sec. 36, sub-sec. 3 — Past and present shareholders — Liability.]**—The Act No. 228, sec. 36, sub-sec. 3, provides “that no past shareholders shall be liable to contribute to the assets of the company, unless it appears to the justices before whom such contribution shall be sought to be enforced, that the existing shareholders are unable to

satisfy the contributions required to be made by them, in pursuance of this Act.” *Held*, that the ability or inability of the present shareholders to satisfy the contributions is a question of fact for the justices to decide. *Semble*, that all present shareholders should be sued, and all means of finding them exhausted, before recourse is had to past shareholders. *Reeves v. Ninham*, 1 V.R. (L.), 100; 1 A.J.R., 90. Banco (1870).

V.

**320. — Official agent — Suit in Equity — Act No. 228, sec. 27 — Act No. 324, sec. 6 — Deed — Dividends — Directors — Sale of company's property — Manager — Loss of books.]**—A suit in Equity was instituted by an official agent against the directors and the manager of a mining company, registered under the Act No. 228, for the winding up of which company an order had been made *inter alia*, for misconduct in declaring dividends out of borrowed money, and for improperly selling the company's property. *Held*—(1.) That the words “estate and effects” in Act No. 324, sec. 6, include not merely debts and chattel property, but liabilities to a company, valuable to it even though of the character of unliquidated damages, and that the suit was properly instituted. (2.) That as the deed of association prefaced its terms of partnership by a covenant of all its members, each with the other—not with the company or any trustee representing it—the violation of one of the clauses, which provided that the directors should not declare dividends out of capital or advances, gave no right to the official agent to sue for such violation, because the company as such could not sue for it. “The remedy must rest upon the deed of association which is a contract between individual shareholders: creditors of the company and the plaintiff as representing them have nothing to do with it.”—*Per Molesworth, J.* (3.) That the directors were responsible for the under-value obtained at a sale of the company's property, such under-value arising from the haste produced by the directors. (4.) That they were responsible for selling the freehold land of the company without authority as required by the deed, and that as between the company, directors, and manager such sales were voidable. (5.) That the directors were responsible for losses arising from the acts of the manager, whom they permitted, in contravention of the deed, to draw money, and obtain possession of the company's property, for which he had not accounted. (6.) That the manager was

responsible for losses arising from the destruction or loss of the books and papers of the company, whether such loss was a matter of design or of gross negligence. It was a breach of duty by the manager to the company, both under the Act No. 228, and the deed of association, and an injury to the company. It was a breach of duty by a person in a confidential situation guilty of wilful default. *Reeves (Official Agent of the Webster Street Freehold G.M. Co. Regd.) v. Croyle*, 1 A.J.R., 109. *Molesworth, J.* (1870). V.

**321. — Compromise by official agent — Act No. 228.]—***Semble*, that an official agent under the Act No. 228 has no power to compromise a suit for contribution for less than the full amount for which the party sued is liable. *Reeves v. Luplau*, N.C., 58. Banco (1869). V.

**322. — Transfer to pauper — Jurisdiction of justices — Act No. 228, sec. 37 — Evidence — Shareholder.]—**“An absolute transfer to a pauper with the intention of evading calls by the transferor is no evidence of *mala fides*. If a transfer is made with the intention that the transferee may at any time reclaim the shares, that would be evidence of *mala fides*; but if the transfer is actually made, if the transferee is not a trustee for the transferor, if the transferor could not recover the shares, then there is no objection to the transfer. It is perfectly competent for justices (acting under Act No. 228, sec. 37), having regard to the provisions of the Act to decide whether, though one person is nominally placed on the share register, he is not in reality trustee for another person, and whether that other is not liable.”—*Per Stawell, C.J. Sleep v. Virtue*, 2 V.R. (L.), 29; 2 A.J.R., 20 (1871). V.

**323. — Shareholders — Appeal on matters of evidence—Evidence all one way.]—**R., an official agent of a mining company under Act No. 228, sued O. for contribution. The evidence that O. was a shareholder was circumstantial. O. was called as a witness for the complainant, but although he denied any recollection of certain circumstances, he did not deny positively that he held shares. The magistrates dismissed the complaint on the ground that there was not sufficient evidence. *Held*, on appeal, that such dismissal was not justified, and the case was remitted to the magistrates with the opinion that they should find for the complainant, unless other evidence was brought forward by the

defendant. It is not the practice of the Court to interfere with the decisions of a tribunal which decides on the evidence when the evidence is conflicting, but it will interfere where the evidence is all one way, and there is no conflict. *Reeves v. Osborne*, 2 A.J.R., 41. Banco (1871). V.

**324. — Act No. 228, secs. 27, 37 — Calls and contribution—Summons — Procedure.]—**S., an official agent, sued H. for contribution on certain shares held by him in a company, registered under the Act No. 228. In the amount of contribution so sued for were included two calls, which had been made by the directors on the capital of the company, but which had not been paid by H. It was objected that the unpaid calls could not be recovered as contribution, but should be sued for as calls. *Held*, that the official agent could sue, as for contribution, for calls made by the directors, before the company was ordered to be wound up, and that the official agent was not bound to bring separate actions for calls and contributions. *Simpson v. Hunt*, 2 V.R. (L.), 54; 2 A.J.R., 44. Banco (1871). V.

**325. — Transfer of shares — Evidence — Impossibility of finding transferee.]—**S., an official agent under Act No. 228, sued M. for contribution. In April, 1870, an order was made for winding up the company. On the 31st December, 1869, M. was the registered holder of shares. On the 8th February, 1870, at a directors' meeting, a transfer of his shares to J.S., dated the 31st December, 1869, and purporting to be accepted by J.S., was put in and passed, and thereupon J.S. was registered as the holder. The complainant proved that he had sent a circular asking for contribution to the address of J.S., as given in the share register, but the letter had been returned through the dead-letter office; that he had applied to the defendant for the address of J.S., but had received no reply. It was also proved that no person of the name of J.S. was to be found in the street named in the address, and that no such person had ever been there to the knowledge of rate collectors and others. The justices decided in favour of the complainant. *Held*, on appeal, that the circumstances proved were not sufficient to negative the fact that the company accepted and registered the transfer from the defendant to J.S., and recognised him as the only person owning the shares, and as a real personage, and that the

Court would not assume that the name of J.S. was a forgery, and the decision was reversed. *Semble*, that M. ceased to be a shareholder on the 31st December, 1869. *Simpson v. Mullaly*, 2 V.R. (L.), 56; 2 A.J.R., 45. Banco (1871).

V.

**326.—Act No. 228, sec. 2—Mining on private property—Official agent.]—**A company formed for the purpose of mining on private property may be legally registered under the *Mining Companies Limited Liability Act 1864* (No. 228), and may be ordered to be wound up under that Act; and the official agent may sue the shareholders therein for contributions. *Davies and Adair v. Cooper*, 2 V.R. (L.), 95; 2 A.J.R., 62. Banco (1871).

V.

**327.—Transfer of shares—Operation from date of transfer unless rules to the contrary.]—**If the rules of a company under Act No. 228 do not provide that transfers of shares will not be recognised unless registered, a shareholder is relieved from liability—as regards creditors—from the day on which he transfers his shares, although the transfer is not registered, provided that the date of the transfer is three months prior to the commencement of the winding up; and the transferor cannot be sued for contributions by the official agent. *Jones v. Simpson*, 2 V.R. (L.), 96; 2 A.J.R., 63. Banco (1871).

V.

**328. — Act No. 324, sec. 8 — Proceedings carried on by succeeding official agent—Suggestion—Petty Sessions.]—**If an official agent resigns, is dismissed, or dies, his successor may continue any suit or actions or proceedings commenced by his predecessor, without altering the name in which the proceedings have been commenced. Although it might be necessary to enter a suggestion on the record in proceedings in the superior Courts, such entry is not required in Courts of Petty Sessions. Act No. 324, sec. 8, considered. *Selfe v. Simpson*, 2 V.R. (L.), 99; 2 A.J.R., 63. Banco (1871).

V.

**329.—Expunging proof of debts—Act No. 228, sec. 33.]—**A judge of a Court of Mines has no jurisdiction under the Act No. 228, sec. 33, to expunge debts already proved before him against a company being wound up. *Reg. v. Skinner, ex parte Smith*, 2 A.J.R., 107. Banco (1872).

V.

**330.—Judgment obtained by company before winding up — Execution after winding up —**

**Suggestion on the record.]—**B., a company registered under the Act No. 228, recovered a judgment against D. in a County Court, on the 14th December, 1869. An order to wind up the company was made on the 1st December, 1870. In July 1871, judgment was signed in the Supreme Court on the judgment of the County Court, and execution issued. *Held*, that there should have been a suggestion of the appointment of the official agent, and that the execution should be set aside. Leave granted to amend the record by entering the suggestion. *Barfold Estate Co. v. Davies*, 2 A.J.R., 97. Banco (1871).

V.

**331.—Mode of suing directors—Contribution—Act No. 228, sec. 37.]—**C., at the time of his death, was the registered shareholder of fifty shares in the Barfold Estate Gold Mining Company, Registered, and a sum of £4 10s. per share was still unpaid. C. died in August, 1870, and the company was ordered to be wound up in December, 1870. The official agent sued C.'s executors before justices for contributions on the shares, under the Act No. 228, sec. 37. *Held*, that the jurisdiction conferred by sec. 37 must be strictly confined within the limits of the Act, and that under that section shareholders only, not the representatives of shareholders, could be sued in the way there provided. *Cooper v. Bath*, 2 V.R. (L.), 136; 2 A.J.R., 86. Banco (1871).

V.

**332.—Mining Companies Act 1871 (No. 409), secs. 2, 121, 124, 125—Mining Companies Act 1864 (No. 228).]—**The *Mining Companies Act 1871*, does not, except as to winding up, apply to companies registered under Act No. 228. *Reg. v. M'Dougall, ex parte Baillie*, 3 A.J.R., 40. Banco (1872). *Tommy Dodd Co. v. Patrick*, 5 A.J.R., 14; F.C., *Barry, A.C.J.*, and *Williams, J. (Fellows, J., dissentiente)*, (1874). But see *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128, 151; 3 A.L.T., 137 (F.C., *Stawell, C.J., Molesworth and Williams, JJ.*), which overrules these cases.

V.

**333.—Act No. 228, secs. 28, 29, 30, 33—Act No. 324, sec. 3—Certiorari—Petitioning creditor's debt.]—**On the 18th November, 1871, the Court of Mines, at Wood's Point, made an order directing the Golden Gate Gold Mining Company, Registered, to be wound up. The order was made on notice. An affidavit verifying the petition was duly filed by the manager of the Colonial Bank of Australasia, the petitioning cred-

itors, to the effect that the company was indebted to the bank in the sums mentioned in the petition. The notice of the intended application to wind up was served at the company's office in Melbourne. On motion to quash the order, affidavits were filed on behalf of the company to the effect that the debt had not been legally contracted under the Act No. 228, as the company had no manager and no duly appointed directors, and that no extraordinary meeting had ever authorised incurring the liability. *Held*, that the question of sufficient service of notice was for the judge. *Held*, further, that the foundation of the jurisdiction to order a winding up was wanting, viz., a debt due to the petitioner, and as no petitioning creditor's debt was proved, the order must be quashed. *Reg. v. Bowman, ex parte Willan*, 3 A.J.R., 122. Banco (1872).

V.

334.]—On appeal to the Privy Council: *Held*, that the debt had been sufficiently proved by affidavit, and that as the judges of the Court of Mines had decided that the debt was due, the Supreme Court could not retry the question, and that the judgment of the Supreme Court should be reversed. *Ibid*, sub nomine *Colonial Bank v. Willan*, L.R., 5 P.C., 417; 43 L.J.P.C., 39; 30 L.T., 237; 22 W.R., 516; 5 A.J.R., 53. J.C., *Sir J. W. Colville, Sir Barnes Peacock, Sir Montague Smith and Sir R. P. Collier* (1874).

V.

335.—Signature to petition—Act No. 228, sec. 29.—Notice of rehearing before justices—Summons.]—Under Act No. 228, sec. 29, a petition for winding up a company need not be signed by the petitioner. When a case on appeal from justices to the Supreme Court is remitted to justices for rehearing, another summons must be issued by the justices and served on the defendant, calling upon him to appear on a day named at the Court of Petty Sessions. A notice to attend given by the complainant or his attorney to the defendant or his attorney, is not sufficient, and an order made for a contribution against a defendant who had only received a notice and not a summons, was held to be bad. *Osborne v. Gaunt*, 3 A.J.R., 47. Banco (1872).

V.

336.—Duty of official agent—Act No. 228, secs. 33, 38.—Collusion—Jurisdiction of Court of Equity—Warrants—Notice.]—The Act No. 228 does not impose on the official agent the duty of opposing proofs of debts. An official agent collusively

enforcing the liability of some shareholders, and omitting to enforce that of others, would by a Court of Equity be charged with the loss, and would perhaps be compelled to perform the duty of enforcement. *Semble*, that such conduct on the part of the official agent would be good cause for not issuing warrants under sec. 38. *Quere*, if under sec. 38, shareholders should have notice of application for warrants. A Court of Equity has no power to enforce contribution. *Smith v. Seal*, 3 A.J.R., 8, 19. *Molesworth, J.* (1872).

V.

337.—Contributory—Warrant—Summons—Act No. 228, sec. 38.]—Under the Act No. 228, sec. 38, a summons to show cause was necessary before a warrant of execution could be issued under that section. *Smith v. Cogdon*, 4 A.J.R., 76. Banco (1873).

V.

338.—Act No. 409, sec. 101—Contributory—Warrant—Summons.]—Under the Act No. 409, sec. 101, before a warrant can be obtained from justices to enforce contribution, a summons to show cause must be issued. *Bradley v. Creeth*, 4 A.J.R., 92. Banco (1873).

V.

339.—Appeal.]—An appeal will lie to the Chief Judge against an order made by a judge of the Court of Mines, for winding up a company. *Semble*, a judge of a Court of Mines would have power to review his own order on the ground of its having been fraudulently obtained. *Colonial Bank v. Willan*, L.R. 5 P.C., 417; 43 L.J.P.C., 39; 30 L.T., 237; 22 W.R., 516; 5 A.J.R., 53. J.C., *Sir J. W. Colville, Sir Barnes Peacock, Sir Montague Smith and Sir R. P. Collier* (1874).

V.

340.—Certiorari—Delay.]—An application for a writ of *certiorari* to bring up a winding-up order for the purpose of having it quashed, must be made promptly and without unreasonable delay. The objection may be taken after the writ is granted on rule to quash. *Reg. v. Bowman, ex parte Garrett*, 4 A.J.R., 177. Banco (1873).

V.

341.—County Court judgment removed to Supreme Court—Act No. 409, secs. 71-73—Appeal—Delay—Contributory—Costs.]—A County Court judgment obtained more than a year before petition to wind up is presented will not be sufficient to support a petition under Act No. 409, sec. 60 (2), although such judgment has been removed into the Supreme Court within a year

of the petition. There is an appeal to the Chief Judge from winding-up orders. *Quære*, as to whether sec. 172 of Act No. 291 is applicable to such appeals. Winding-up orders establish no right of debt in the petitioner or anybody. They terminate the operations of companies, which may at once seek redress if they are wrong, and must be informed of them promptly. Persons complaining of winding-up orders should apply promptly, and Courts, before setting them aside, should consider the delay and the time when the applicant had notice. The Court of Mines in dismissing an application to set aside a winding-up order, has power to award costs. *Watson v. Commercial Bank*, 5 V.L.R. (M.), 36. *Molesworth, J.* (1879). V.

342.—County Court Statute 1869 (No. 345), sec. 93, Schedule XI.—Mining Companies Act 1871 (No. 409), sec. 71.]—The Act No. 409, sec. 71, provides that no petition for winding up shall be presented on a judgment more than a year old. Where a judgment had been obtained in a County Court in 1873, and removed into the Supreme Court in 1878: *Held*, that the Supreme Court judgment was only a mode of enforcing the original debt, and that the petition to wind up the company was not based upon a judgment obtained within the previous year, and that it could not be granted. *Commercial Bank v. Hope Tribute Co.*, 5 V.L.R. (M.), 1. *Molesworth, J.* (1879). V.

343.—Debt—Dividend—Act No. 409, sec. 112—Act No. 228—Rules.]—A dividend due to a shareholder is a debt within the meaning of Act No. 409, sec. 112, and being unpaid, prevents a voluntary winding up under that section. Under Act No. 228 rules providing for winding up were *ultra vires*. *Tommy Dodd Co. v. Patrick*, 5 A.J.R., 14; *Reg. v. McDougall*, 3 A.J.R., 40, followed. *Tommy Dodd Co. v. McClure*, 1 V.L.R. (L.), 237. Banco (1875). But see 353, *infra*. V.

344.—Ex parte orders—Irregular orders—Notice—Discharge—Jurisdiction—Right to sue—Mortgage—Act No. 409, secs. 61-74—Act No. 228, sec. 25.]—Under Act No. 409, sec. 61, an *ex parte* winding-up order cannot be regularly made without seven days' notice. And, *semble*, such an order must show that the notice has been given, and, if irregular, it can be set aside by the Court which made it. A good winding-

up order is the common property of all creditors, and cannot be discharged on the consent of the petitioner. If a regular order to wind up has been made, and no steps taken for the appointment of a liquidator, the right of the company to sue in equity remains. When a company registered, under Act No. 228, mortgaged its property, part of the consideration being a past debt, the rest future advances, the mortgage was good for the latter. *United Hand and Band Co. v. National Bank*, 2 V.L.R. (E.), 209. *Molesworth, J.* (1876). V.

345.—Ex parte order—Notice.]—An *ex parte* winding-up order, under Act No. 409, is bad if it is not shown on the face of the order that seven days' notice of the application to wind up had been given to the company by being left at the company's office. *Garret v. Creeth*, 5 A.J.R., 36. Banco (1874). V.

346.—Liquidator—Sanction of Court—Act No. 409, secs. 74-80.]—A liquidator appointed under Act No. 409 can only be removed with the sanction of the Court of Mines, and after he has had an opportunity of being heard both before the judge and at the meeting of creditors at which his removal is to be proposed. *Quære*, whether the Chief Judge has power to interfere with the exercise of the discretion of the Court below in appointing or removing a liquidator. *Rigby v. Hasker*, 5 V.L.R. (M.), 35. *Molesworth, J.* (1879). V.

347.—Mining Companies Act 1871 (No. 409)—Meeting of creditors, secs. 65, 74, 99—Meeting of creditors—Proxies—Notice to contributory.]—A person present and acting at the time and place appointed for a meeting of creditors under Act No. 409, sec. 74, holding proxies for more than one creditor, may by resolution appoint a liquidator. *Quære*, whether one creditor can constitute a meeting within the meaning of secs. 65 and 74. Advertising the order settling the list of contributories, and giving notice to each contributory to pay within ten days after the appearance of such advertisement is a sufficient compliance with sec. 99. *Reg. v. Cogdon, ex parte Hasker*, 3 V.L.R. (L.), 88. Banco (1877). V.

348.—Act No. 228—Calls—Act No. 409, secs. 52, 90—Liquidator.]—A liquidator of a company registered under Act No. 228, in process of winding up under Act No. 409, can sue in the County Court for calls made prior to the winding



up, and is not limited by the time mentioned in Act No. 409, sec. 52. *Hasker v. Bride*, 4 V.L.R. (L.), 460. Banco (1878). V.

349.—Act No. 228, sec. 27 — Bargain with liquidator.]—S., a contributor in a company under Act No. 228, promised to pay his official agent the amount of his contribution if he got time and if other contributors were sued. To this arrangement the official agent agreed, gave time, and sued the other contributors. S. refused to pay. *Held*, that S. was liable, and that the official agent could sue on the special contract. *Hasker v. Schlesinger*, 4 A.J.R., 186. Banco (1873). V.

350.—Order ex parte—Act No. 409.]—An *ex parte* winding-up order, under the Act No. 409, is good if in the scheduled form. *United Hand and Band Co. v. National Bank*, 3 V.L.R. (E.), 69. F.C. (1877). V.

351.—Order—Certiorari—Act No. 409, sec. 74 —Meeting.]—A winding-up order good on its face cannot be quashed by *certiorari*. One person holding proxies for two creditors may constitute a meeting and appoint a liquidator under Act No. 409, sec. 74. *Reg. v. Leech, ex parte Tolstrup*, 5 V.L.R. (L.), 494. Banco (1879). V.

352.—Sheriff—Act No. 379, sec. 74—Act No. 409, sec. 70 — Sequestration.]—An order for winding up a company under Act No. 409, is not a sequestration within the meaning of the *Insolvency Statute* (No. 379), sec. 74, and the proceeds of an execution against a company in the hands of the sheriff at the time of the winding-up order, do not vest in the clerk of the Court of Mines by Act No. 409, sec. 70; but belong to the execution creditor. *Oriental Bank v. Wattle Gully Co.*, 1 V.L.R. (L.), 28. Banco (1875). V.

353.—Mining Companies Limited Liability Act 1864 (No. 228)—Mining Companies Act 1871 (No. 409), sec. 124.]—All companies registered under the *Mining Companies Limited Liability Act* 1864 (No. 228), and not registered as “no-liability” companies under the *Mining Companies Act* 1871 (No. 409), are by virtue of sec. 124 of that Act brought under Part I. of that Act, and the last mentioned Act therefore applies to them in all cases whether they are being wound up or not. *Reg. v. McDougall*, 3 V.R. (L.), 66; and *Tommy Dodd Co. v. Patrick*,

5 A.J.R., 14, over-ruled. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C., *Stawell, C.J., Molesworth and Williams, JJ.* (reversing *Higinbotham, J.*), (1881-2). V.

354.—Application to settle list of contributories—Objection to winding-up order—Mandamus—Mining Companies Act 1871, sec. 97.]—Upon an application by a liquidator to settle the list of contributories, the judge is not to entertain objections to the validity of the order for winding up. *Reg. v. Trench, ex parte McDougall*, 6 V.L.R. (L.), 309; 2 A.L.T., 60. *Stawell, C.J., Barry and Stephen, JJ.* (1880). V.

355.—Mining Companies Act 1871 (No. 409), secs. 89, 187—Banker and customer—Dishonour of cheque—Jus tertii.]—Where an order was made to wind up a mining company under the *Mining Companies Act* 1871 (No. 409), and the manager, appointed liquidator, opened a liquidation account with a bank; and afterwards another order was made setting aside the winding-up order, and the directors of the company gave notice to the bank of the order so made, and required the bank to hold the moneys received in the liquidation account for the company, on an action by the liquidator against the bank for dishonouring his cheque: *Held*, that he could not sue in his own name to recover moneys paid in as liquidator; nor could he draw a cheque as liquidator, for he ceased to be liquidator when the order setting aside the winding-up order was made. *Macdougall v. Bank of Victoria*, 7 V.L.R. (L.), 230; 3 A.L.T., 6. *Stawell, C.J., Stephen and Higinbotham, JJ.* (1881). V.

356.—Mining company — Winding-up order — Service of petition — Registered office.]—It is sufficient if a petition for winding up a mining company be served at the place registered as the office of the company in the office of the Registrar-General. *Smith v. Australian and European Bank*, 8 V.L.R. (M.), 23; 4 A.L.T., 26. *Molesworth, J.* (1882). V.

357.—Winding-up order — When may be set aside.]—*Per Molesworth, J.*:—“When a winding-up order is made by a proper judge, and extensively acted upon, other enforcement of rights practically suspended, much trouble and expense incurred, many approaches to adjustment made, I think it would require a very strong case of irregularity, even of what might



be called nullity in the obtaining an order of winding up, to set it aside, and that such an application should be made with great promptitude." *Smith v. Australian and European Bank*, 8 V.L.R. (M.), 23, at p. 27; 4 A.L.T., 26. *Molesworth, J.* (1882). V.

**358.—Mining Companies Act 1871 (No. 409), sec. 93 — Proof of debt — Proving creditor — Opposing creditor—Compromise—Withdrawal of opposition.]—**Where a shareholder, creditor, or contributory calls upon a person claiming to be a creditor of a mining company which is being wound up to come in under sec. 93 of the *Mining Companies Act 1871* (No. 409), and prove his debt before the Court of Mines, the parties are in the same position as a plaintiff and defendant in an action in a Court of law, and if, in the course of their litigation, they make an agreement or compromise between themselves, the Court is bound to act upon it. *National Bank v. Campbell*, 12 V.L.R., 67; 7 A.L.T., 113. F.C., *Williams, Holroyd and Cope, JJ.* (1886). V.

**359.—Mining Companies Act 1871 (No. 409), sec. 93—Proof of debt.]—**Where a shareholder, contributory, or creditor of a mining company, being wound up, calls upon a creditor to prove his debt under sec. 93 of the *Mining Companies Act 1871* (No. 409), the decision of the Court does not bind the other shareholders, contributories, or creditors, any or all of whom may at any time (at all events until the debt is paid), call on the proving creditor to again prove his debt. *National Bank v. Campbell*, 12 V.L.R., 67; 7 A.L.T., 113. F.C., *Williams, Holroyd and Cope, JJ.* (1886). V.

**360.—Mining company carrying on operations out of Victoria—Registered office in Victoria—Mining district—Jurisdiction of Supreme Court —Mining Companies Act 1871 (No. 409), secs. 59, 61—Mining Companies Act 1886 (No. 881), sec. 2.]—**The Supreme Court has no jurisdiction to order the winding up of a mining company, registered under the *Mining Companies Act 1871* (No. 409), and having its registered office in a mining district of the colony of Victoria, but carrying on its operations out of the colony. *In re Paroquet G.M. Co. No Liability*, 15 V.L.R., 609. *Hodges, J.* (1889). V.

**361.—Mining company carrying on operations out of Victoria—Registered office in Victoria—**

**Mining district—Winding up—Jurisdiction of Supreme Court—Mining Companies Act 1871 (No. 409), secs. 59, 61—Mining Companies Act 1886 (No. 881), sec. 2.]—***Quere*, whether the Supreme Court has jurisdiction to wind up a company carrying on business out of Victoria, if the registered office be in Victoria, but in a part of the colony which is not within a mining district. *In re Paroquet G.M. Co. No Liability*, 15 V.L.R., 609. *Hodges, J.* (1889). V.

**362.—Mines Act 1890 (No. 1120), sec. 210—Appeal from Court of Mines—Companies Act 1890 (No. 1074), Part II., secs. 250-255—Winding up of company.]—**An appeal lies to the Full Court under sec. 210 of the *Mines Act 1890* (No. 1120), from an order of a Court of Mines directing a company to be wound up. *In re Midas Extended G.M. Co., ex parte Morley*, 17 V.L.R., 647. F.C., *a'Beckett and Hodges, JJ. (Higinbotham, C.J., diss.)*, (1891). V.

**363.—Companies Act 1890 (No. 1074), Part II. —Company not having debts—Winding up by Court.]—***Per a'Beckett, J.* :—Part II. of the *Companies Act 1890* (No. 1074), does not contemplate a compulsory winding up of a company where there are no creditors. *Per Hodges, J.* :—The fact that there are no creditors should be an important fact in the Court exercising its discretion not to so wind up, assuming it to have jurisdiction in the matter. No opinion on this point was expressed by *Higinbotham, C.J.* *In re Midas Extended G.M. Co., ex parte Morley*, 17 V.L.R., 647. F.C. (1891). V.

**364.—Companies Act 1890 (No. 1074), sec. 303 —Winding up of company—Indebtedness.]—**On 27th February, 1891, a no-liability company was indebted by way of overdraft to the Union Bank at the Ballarat branch. On the morning of the 27th, a sum of money, sufficient to cover the overdraft, was paid into the company's account at the head office of the bank at Melbourne, the money consisting chiefly of cheques. The only evidence of this payment was a pay-in-slip which contained the condition that the cheques were "not available until collected." There was no evidence that any of the cheques had been subsequently dishonoured. A resolution for winding up the company voluntarily was passed in the afternoon of 27th February. *Held*, that inasmuch as the cheques were not available until collected, the debt to the bank had not been discharged at the time of the passing of the

resolution, and that therefore as the company was "in debt," the voluntary winding up must be held invalid. *Morley v. Gore*, 19 V.L.R., 199; 14 A.L.T., 117; 15 A.L.T., 27. F.C., *Williams, Holroyd and Hodges, JJ.* (reversing *a'Beckett, J.*), (1892-3). V.

**365.—Companies Act 1890 (No. 1074), Part II., secs. 191, 252, 254—Mining company carrying on operations elsewhere than in Victoria—Registered office in Victoria—Mining district—Winding up—Jurisdiction of Supreme Court.]—**Where a mining company carries on its operations elsewhere than in Victoria, and has its registered office in Victoria in a place not within any mining district, the Supreme Court has jurisdiction to order the winding up of such company. *In re Tumut Alluvial G.M. Co.*, 19 V.L.R., 391; 15 A.L.T., 54. *Williams, J.* (1893). Cf., 361 *supra*. V.

**366.—Deed of settlement—Winding up—Debt by company—Calls—Set-off.]—**By the deed of settlement of a tin mining company, it was provided that certain moneys amounting to £638 were to be paid to W. out of moneys actually received for calls, or out of the profits of the mine. W., by deed, assigned these moneys to S.; W. was a shareholder in the company, and liable as such to contribute towards the company's liabilities to a larger amount than the sum assigned by him to S. No calls had been made, and there had been no profits. On the winding up of the company, S. claimed to prove against the company's estate the said sum of £638, which claim was opposed by the official liquidator, but allowed by the Chief Commissioner. On appeal the Chief Commissioner's decision was sustained. *Held*, that S., as the assignee of W., was entitled to prove for the said sum in his own name against the estate of the company without any right of set-off by the company in respect of the liabilities of W. as a shareholder therein. *In re St. Lucia Tin M. Co. Ltd.*, 13 N.S.W.S.C.R. (E.), 31. *Hargrave, J.* (1875). N.S.W.

**367.—Registration—Winding up—Judgment against official manager.]—**A company formed for gold mining purposes was not registered; an order was made for winding it up on a judgment obtained against S., who had been dealt with as official manager. On motion by shareholders to set aside that winding-up order: *Held*, that as they had taken no steps to show that the com-

pany was not registered, and had allowed the judgment to go, and had not opposed the petition for winding up, the shareholders could not afterwards set up the non-registration of the company for the purpose of setting aside the winding-up order. *In re Morning Star G.M. Co.*, 2 N.S.W.S.C.R.N.S. (E.), 14. *Manning, J.* (1879). N.S.W.

**368.—Winding up—Contributory—Shares applied for and allotted in the name of another—Liability.]—**See *In re Ethel Tin M. Co. Ltd., Wesley and Fergusson's Shares*, 3 N.S.W.W.N., 65. *Deffel, C.C.* Insolvency (1886). N.S.W.

**369.—Contribution—Liability of shareholders to indemnify directors for liabilities incurred in excess of their powers—Ratification.]—**The doctrine of contribution does not depend upon contract but upon general principles of equity, and is not an incident of suretyship alone; thus where a shareholder has ratified the act of his directors in rendering themselves personally responsible for liabilities incurred on behalf of the company but in excess of their powers, he is liable to contribution in respect of such liabilities in proportion to the number of shares held by him. Where a shareholder had at a general meeting moved the adoption of a report containing a statement of such liabilities and an account of the transactions in respect of which they had been incurred: *Held*, this was sufficient evidence of ratification. *Toohy v. McCulla*, 10 N.S.W.L.R. (E.), 264; 6 W.N., 106. *Owen, J.* (1889-90). N.S.W.

**370.—Mining Partnerships Act (24 Vic. No. 21)—Amending Acts, 34 Vic. No. 16, 40 Vic. No. 3—Compulsory winding up—Companies Act, sec. 243—"Unregistered company."]—**A company registered under the *Mining Partnerships Act* (24 Vic. No. 21), and not registered under the *Companies Act*, may be compulsorily wound up under the *Companies Act*. *In re Grand United G.M. Co.*, 10 N.S.W.L.R. (E.), 269; 6 W.N., 106. F.C. (1889). N.S.W.

**371.—No Liability Mining Companies Act (44 Vic. No. 23), secs. 9, 11—Companies Act (37 Vic. No. 19), sec. 243—Liquidation.]—**A company registered under the *No Liability Mining Companies Act* can be wound up by the Court under the *Companies Act*. The decision of *Molesworth, J.*, in *Re Collingwood Q.M. Co.*, 5 W.W. & A'B. (E.), 190 (1868), not followed. *Per Manning,*

*J.*, at p. 26 :—"Does the *No Liability Mining Companies Act* preclude it? Sec. 11 of that Act no doubt incorporates a number of sections under the *Companies Act*, but those are sections relating to the working of the company, and that section is just inserted for the purpose of incorporating these sections of the *Companies Act* with the *No Liability Mining Companies Act*. I do not see that because a number of sections are incorporated in that way others are necessarily excluded." *Per Manning, J.*, at p. 27 :—"I think that a monstrous injustice would be done to creditors if a company, registered under the *No Liability Mining Companies Act*, could not be wound up under sec. 243, and that as the power to do so has not been taken away by express words, and as there is a debt due from the company to the petitioner, I must make the order as asked, and therefore order the company to be wound up." *In re Brown's Creek G.M. Co. No Liability*, 14 N.S.W.L.R. (E.), 24. *Manning, J.* (1892). N.S.W.

372.—*Companies Act 1874 (37 Vic. No. 19), secs. 6, 10, 21, 57*—Settling list of contributories—Shares at a discount—Registered contract—Issue of shares—Signatory to memorandum—Illegal association—Costs of official liquidator.]—A contract made with a trustee for a proposed company and registered, and subsequently acted upon by the company after its formation, is a sufficient compliance with sec. 57 of the *Companies Act*. *Hartley's Case*, L.R. 10 Ch., 157 (1875), reluctantly followed. Shares for which signatures are affixed to a memorandum of association are "issued" on the registration of the memorandum. *Fothergill's Case*, L.R. 8 Ch., 270 (1873), and *Dalton Time Lock Co. v. Dalton*, 66 L.T.N.S., 704 (1892), followed. Where an official liquidator is an applicant or plaintiff, he is treated as an ordinary litigant in having to pay costs personally if unsuccessful; but, where he is defendant or respondent, the order for costs, if any, will be against the company. *In re Bonang G.M. Co. Ltd., Brown's Case*, 14 N.S.W.L.R. (E.), 262. *Manning, J.* (1893). N.S.W.

372a.]—A contract made with a trustee for a proposed company, and registered, and subsequently acted upon by the company after its formation, is a sufficient compliance with sec. 57 of the *Companies Act*. *Hartley's Case*, L.R. 10 Ch., 157, followed. Decision of *Manning, J.*, *supra*, affirmed. *In re Bonang G.M. Co., Brown's*

*Case*, 14 N.S.W.L.R. (E.), 347. *Darley, C.J., Owen and Foster, J.J.* (1893). N.S.W.

372b.]—Where the members of a syndicate resolved to form a company, distributing the shares therein rateably amongst themselves according to the extent of their interests in the syndicate property, the same to be deemed in great part paid up, and a deed of sale of their property was executed by their trustees to a trustee for the company, afterwards filed with the Registrar and adopted by the directors, which embodied the above resolution: *Held*, that the deed of sale was not a contract within the meaning of sec. 57 of the N.S.W. Act of 1874, corresponding with sec. 25 of the English *Companies Act* of 1867, so as to protect the shares from liability to calls in respect of the amounts which were to be deemed as paid up. It did not affect a genuine transfer of property in respect of which shares deemed to be paid up formed part of the consideration; nor were there any legal rights or liabilities created thereby. *Hartley's Case*, L.R. 10 Ch., 157, distinguished. *Smith (Official Liquidator of Bonang Co. Ltd.) v. Brown* (1896), A.C., 614; 65 L.J.P.C., 89; 75 L.T., 213; 45 W.R., 132. J.C., *Lords Halsbury, L.C., Herschell, Watson, Hobhouse, Macnaghten, Morris, Davey and Sir Richard Couch* (1896).

N.S.W.

372c.—Winding up—Liquidator—Refusal to confirm appointment—56 Vic. No. 24, sec. 12.]—The Court refused to confirm the appointment of a liquidator, as the relation in which he stood towards certain creditors rendered it difficult for him to act impartially in the interests of the company generally. *Re Swanbank Collieries Ltd.*, 7 Q.L.J. (N.C.), No. 88. *Griffith, C.J.* (1894). Q.

373.—*Companies Act 1864—Practice—Stay of proceedings.*]—The Court will stay proceedings against the shareholders of a company which is being wound up, although such proceedings were instituted to recover a debt which became due prior to the registration of the company. *In re Karkarilla M. Co. Ltd., Moyle's Case*, 1 S.A.L.R., 43. *Gwynne, J.* Equity (1867). S.A.

374.—Forfeiture—Calls—List of contributories—Discretion of directors.]—*Per curiam* :—"The non-payment of calls did not work a forfeiture, and, there being nothing to show that

the directors had declared them forfeited, the defendant was rightly placed on the list of contributories." *Potosi M. Co. Ltd. v. O'Halloran*, 4 S.A.L.R., 87. *Hanson, C.J., Gwynne and Wearing, J.J.* (1870). S.A.

**375.—Companies Act 1864—Liquidator—Right of bringing action.]**—Clause 123 of the *Companies Act 1864*, empowering a liquidator to apply to a judge of the Supreme Court in Chambers, does not deprive him of his right to bring an action for unpaid calls, but is a cumulative remedy. *Inglewood Mining Venture Ltd. v. Price*, 6 S.A.L.R., 2. *Hanson, C.J., Gwynne and Wearing, J.J.* Common Law (1872). S.A.

**376.—Companies Acts—Dissolution.]**—Where from any cause, whether from a defect in its articles of association or otherwise, a company is unable to pursue the objects for which it is formed, the Court has power on petition of parties interested to order its dissolution. *In re Kapunda United Tradesmen's Prospecting Co. Ltd.*, 8 S.A.L.R., 55. *Gwynne, J.* Equity (1874). S.A.

**377.—Companies Acts — Meeting, Impracticability of—Dissolution.]**—A provision in articles of association of a company requiring persons representing the whole of its shares to be present at its general meetings is in itself a ground for ordering the winding up of the company where some of its shareholders reside at the place where the operations of the company are to be carried on, but at so great distance from the office of the company as to render it difficult, if not practically impossible to secure their attendance at such general meetings. *In re Kapunda United Tradesmen's Prospecting Co.*, 8 S.A.L.R., 55. *Gwynne, J.* (1874). S.A.

**378.—Companies Act 1864, sec. 75—Power of Court — Dissolution.]**—*Semble*, the Court can make an order for dissolution under the above circumstances if it thinks it is "just and equitable that the company should be wound up." *In re Kapunda United Tradesmen's Prospecting Co.*, 8 S.A.L.R., 55. *Gwynne, J.* (1874). S.A.

**379.—Companies Act 1864—Compulsory winding up—Failure to prosecute objects for which founded—Qualification of directors—Bona fide subscription for shares.]**—The memorandum of association of a company purporting to be started

for the purpose of purchasing and working certain claims specified in the prospectus provided, amongst other things, that the company was to be considered formed as soon as 15,000 shares should have been applied for, and that applicants for shares should pay 2s. 6d. per share on application and 5s. on allotment. 14,000 shares only having been applied for, one of the promoters sent in applications on behalf of persons in the Northern Territory for (in all) 1,000 shares, but on these shares no money whatever had been paid; and thereupon the company was treated as formed, nor was there any evidence that such promoter was authorised so to apply. The memorandum of association further provided that the promoters should receive 7,500 fully paid-up shares, but these shares were in fact never allotted. The articles of association provided that every director should be a holder of at least 100 shares. Subsequently to its formation as above, one of the promoters was appointed director of the company, basing his qualification on his claim to the unallotted shares above mentioned. Machinery was purchased for the purpose of carrying on the necessary mining operations, but before anything was done it was found that the information on which the prospectus was issued was incorrect, and the claims specified in the prospectus were never transferred to the company. The machinery was accordingly sold, and the only object which the company proposed to effect by continuing in existence was to prosecute an action against the Northern Territory promoters for fraudulent misrepresentation. More than one year had elapsed between the time when the company was first started and the filing of the petition for compulsory liquidation. *Held*—(1.) That the 15,000 shares had never been *bond fide* subscribed for, and the company therefore never legally formed. (2.) That the appointment of the promoter as director was a nullity, he not possessing the necessary qualification. (3.) That assuming the company to have been properly formed, nothing substantial having been done within one year from its formation, the subject matter (the claims mentioned in the prospectus), never having been acquired, and the only object proposed to be attained by the continuance of the company not being one of legitimate mining enterprise, the Court would order a compulsory liquidation on the ground that it was just and equitable that the company should be wound up. *In re Golden*

*Reef M. Co. Ltd., ex parte Ward*, 8 S.A.L.R., 241. *Gwynne, J. Equity* (1874). S.A.

**380.—Principal and agent—Company—Warranty of authority—Onus probandi.**—The defendant, being secretary to the Yam Creek Gold Mining Company, telegraphed to the plaintiff to wind up the affairs of the company. There was subsequent correspondence between the parties, the plaintiff sometimes addressing the defendant personally, at others as secretary to the company; and the account was opened in the books of the plaintiff in the name of the company. There was no evidence that the defendant had not authority so to employ the plaintiff on behalf of the company. *Held*, that the defendant was not personally liable; and that the *onus* of proving that the defendant had not authority rested on the plaintiff. *Jones v. Scott*, 9 S.A.L.R., 174. *Hanson, C.J., Gwynne and Stow, JJ. Common Law* (1875). S.A.

**381.—Companies Act 1864—Liquidation—Contributories—Fully paid-up shares—Agreement—Memorandum of association.**—By an agreement made between B. and C., it was agreed that B. should sell to C. for purpose of an intended mining company, certain mineral claims, the purchase-money to be £3,000 and 3,000 fully paid-up shares in the company when formed. The company was formed, and the agreement was referred to in the memorandum of association, but was not filed with the Registrar of Companies. The company subsequently went into liquidation and certain of the shareholders filed a petition for the purpose of having B.'s name placed on the list of contributories. *Held*, that whatever the rights of creditors of the company, the shareholders, for whom at most B. was merely in the nature of a surety, had no rights as against B. *In re North Eleanor G.M. Co. Ltd.*, 10 S.A.L.R., 174. *Gwynne, J. Equity* (1876). S.A.

**382.—Liquidation—Contributory—Authority to place on register—Revocation.**—A person whose name has been placed on the register of a company without his consent or authority is not bound to take steps to remove his name from such register, nor liable as a contributory on the liquidation of the company. The defendant made application in writing to B., a broker, employed to float an intended company, to have

100 shares in the proposed company allotted to him, accompanying such application, in accordance with the terms of the prospectus, with a cheque for the allotment-money. Before allotment the defendant saw B. and verbally withdrew his application, and his cheque for the allotment-money was torn up in his presence by B. who, being then unable to find the application, the same was not returned to the defendant. The company was formed, defendant's name being placed on the register in respect of the 100 shares, and remained on the register at the time of the voluntary liquidation of the company, and notices were from time to time sent to him as a shareholder, some of which he returned, and others wholly disregarded. *Held*, that the defendant was not, under the above circumstances, liable for liquidator's calls. *Great Amalgamated G.M. Co. Ltd. v. Morris*, 11 S.A.L.R., 9. *Gwynne and Stow, JJ. Common Law* (1876-7). S.A.

**383.—Winding up—Fraud of promoters—Laches in removing name from register.**—*In re Photographic Co. of S.A.*, 18 S.A.L.R., 13. *Boucaut, J.* (1884). S.A.

**384.—Mining Companies Acts No. 204 of 1881 and 256 of 1882, sec. 10—Issue of paid-up shares—Distribution of surplus on winding up.**—Paid-up shares may be issued in a no-liability company. In ordinary cases of winding up companies the assets, after all liabilities have been discharged, are distributable amongst the shareholders according to the amount of capital contributed. The law in this respect has not been altered by the *Joint Stock Companies Act* of 1864 or by the *Mining Companies Acts* of 1881 and 1882. Where, therefore, in a no-liability company some of the shareholders held shares fully paid up to 10s., and other subscribing shares in which 2s. had been paid: *Held*, that the surplus assets must be distributed amongst them in the proportion of 10s. to 2s. *Per Way, C.J.*, at p. 23:—"Any contract with respect to the distribution of the profits does not affect the distribution of the capital unless it is expressly extended to the capital." *Per Boucaut, J. (arg.)*, at p. 22:—"In a limited company there is a liability to pay, based on contract. Here there is no contract and no liability." *In re Malakoff G.M. Co. No Liability*, 18 S.A.L.R., 20. *F.C., Way, C.J., and Boucaut, J.* (1884). S.A.

**384a.—Companies Act 1864, sec. 34—Rectification of register—Removal of contributory on application of co-contributory—Costs.]**—At the instance of W., a prospectus was issued inviting applications for shares in a mining company, stating that as soon as 500 shares were applied for by the public, the company was to be considered floated. On the floating of the company, a considerable sum of money would inure to W. through his nominees. Only 359 shares were applied for by the public, when W. (the vendor of the proposed company) put in an application in the name of H. for the remaining 141 shares, but paid no cash in connection with the application. On the winding up of the company, there was a surplus, and A. (a contributory) took out a summons, calling upon H. to show cause why he should not be removed from the register, on the ground that the application in the name of H. by W. for 141 shares was a fraud, and that the company never was properly constituted. *Held*, that the name of H. must be removed from the list of contributories. H. was ordered to pay the costs of the applicant, and of the liquidator; the applicant to have costs as between solicitor and client from the company. *In re Mount James Consolidated S.M. Co. Ltd.*; *In re Hayward, ex parte Allen*, 23 S.A.L.R., 127. *Boucaut, J.* (1889). S.A.

**384b.—Employer and employee—Weekly hiring—General hiring—Determination of service—Reasonable notice—Winding up of company.]**—The plaintiff was engaged by the defendant company at a weekly salary as manager of a mine in the MacDonnell Ranges, five weeks' journey from Adelaide. On 9th April, 1889, the company gave plaintiff a week's notice determining the service, but the company made no provision for relieving him of the custody and care of their camels and other property, of which the plaintiff remained in charge after the expiration of the notice. On April 10th, a resolution was passed to wind up the company. The plaintiff then claimed wages to 20th August, 1889, in lieu of notice. *Held*, that the presumption of a weekly hiring, raised by the reservation of a weekly salary, was rebutted by the other circumstances of the service. The plaintiff was accordingly entitled to reasonable notice, and under the circumstances his claim for payment up to 20th August was a reasonable one. *Semble*, a resolution to wind up the company did not

determine the contract of service. *Wild v. Great Matrix Ruby M. Co. Ltd.*, 24 S.A.L.R., 48. F.C., *Way, C.J., Boucaut and Runday, J.J.* (1890). S.A.

**385.—Winding up—Court having jurisdiction—Mining Companies Act 1872 (N.Z.), (36 Vic. No. 33).]**—The District Court for the district where it was contemplated that a mining company would carry on operations is the proper tribunal to entertain a petition to wind it up, although no operations have actually been carried on. The Supreme Court has no jurisdiction where there is a District Court for such district. *In re Submarine G.M. Co. Ltd.*, C.L.J., 63; 1 N.Z.J.R. (N.S.) S.C., 37. N.Z.

**386.—Winding up—Jurisdiction—Acquiescence in order afterwards impeached—Estoppel.]**—Where contributories had allowed several months to elapse before moving to set aside an order for winding up on the ground of want of jurisdiction: *Held*, that they were not estopped on that account. *In re Submarine G.M. Co. Ltd.*, C.L.J., 63; 1 N.Z.J.R. (N.S.) S.C., 37. N.Z.

**387.—Winding up—Contributories—Forfeiting shareholders—Mining Companies Act 1886 (N.Z.), (50 Vic. No. 19), secs. 54, 99, 100.]**—In the winding up of a gold mining company incorporated under the N.Z. *Mining Companies Act 1886* (50 Vic. No. 19), forfeiting shareholders are liable under sec. 54 to contribute in respect only of such part of the debts which were owing when they forfeited as remains owing at the date of the winding-up order. *Ex parte Harley, In re Owen Q.M. Co. Ltd.*, 7 N.Z.L.R., 476. *Richmond, J.* (1889). N.Z.

**388.—Mining Companies Act 1886 (N.Z.), (50 Vic. No. 19)—Contributories.]**—The holders of fully paid-up shares do not come within the definition of contributories given in the *Mining Companies Act 1886*, and no call can be levied on contributories to equalise the payments of these two classes of shareholders. *In re White's Reef G.M. Co.*, 11 N.Z.L.R., 24. *Williams, J.* (1891). N.Z.

**389.—Adjustment of right of contributories—Levying call.]**—*Quere*, whether there is power under the N.Z. *Mining Companies Act 1886* (50 Vic. No. 19), to levy a call even for the purpose of adjusting the rights of contributories amongst themselves. *In re White's Reef G.M. Co.*, 11 N.Z.L.R., 24. *Williams, J.* (1891). N.Z.

**390. — Contributories — Shareholders having forfeited more than twelve months before liquidation.]—Shareholders who for non-payment of calls have forfeited their shares for more than twelve months before liquidation, cannot be placed on the list of contributories on the ground that the calls were improperly made, and in the absence of a duly qualified quorum of directors. *In re White's Reef G.M. Co.*, 11 N.Z.L.R., 24. *Williams, J.* (1891). N.Z.**

**391.—Mining Companies Act 1886 (N.Z.), (50 Vic. No. 19), secs. 47, 54, 75—Twelve months' liability—Winding up.]—In order to fix a shareholder with liability under sec. 54 of the *Mining Companies Act 1886* (50 Vic. No. 19), it is sufficient if a petition for winding up, on which an order is made, is presented within the twelve months referred to in that section, and it is not necessary that the order for winding up should be made within the twelve months, and sec. 47 is to be construed the same way. The second clause of sec. 54 is inserted *ex abundanti cautela*, and does not limit the operation of the first clause of that section. Sec. 75 fixes the time during which the liability lasts. *In re Nenthorn Consolidated Q.M. Co., Edmond's Case*, 11 N.Z.L.R., 413. *Williams, J.* (1892). N.Z.**

**392.—Winding up—First and second list of contributories—Embezzlement by liquidator—Power of Court to settle third list of contributories—Mining Companies Act 1886 (N.Z.), (50 Vic. No. 19), secs. 102, 108—Mining Companies Act Amendment Act 1890 (54 Vic. No. 14), sec. 3.]—An order for the winding up of the W. Company was made by the Nelson District Court on 25th September, 1890, under the *Mining Companies Act 1886* (50 Vic. No. 19), and its amendments, and one R. was appointed liquidator by the Court under sec. 3 of the *Amendment Act* of 1890. A first and afterwards a second list of contributories were settled by the Court under secs. 102 and 108 of the 1886 Act, and the assets of the company and the amounts received from the contributories under the lists so settled would have been sufficient, if properly applied, to satisfy the debts and liabilities of the company. The liquidator R., however, embezzled a considerable portion of these. A new liquidator, M., was appointed in his stead, and he applied to the Court to settle a third list of contributories to enable him to pay the creditors the balance due them, and to meet additional ex-**

penses incurred. The District Court judge held he had no power to do so, and that the liquidator was trustee for the creditors, who ought therefore to bear the loss. *Held*, on appeal, that the Court had this power. *In re Extended Wakahi G.M. Co., Moore v. Cuff*, 13 N.Z.L.R., 544. *Richmond, J.* (1894). N.Z.

**393.—Winding up company—Company registered in Victoria—Carrying on business in another colony—Jurisdiction of Supreme Court.]—See PRACTICE, 222, 223.**

**394.—Mining company carrying on operations outside Victoria—Winding up—Jurisdiction of Supreme Court.]—See PRACTICE, 224.**

**395.—Mining partnership—Deed of settlement—Not signed—Director—Estoppel.]—See PARTNERSHIP, 18.**

**396.—Secretary of company—Injunction—Contract—Masters and Servants Act.]—See EMPLOYER AND EMPLOYEE.**

**397.—Winding up company—Jurisdiction—Acquiescence in order afterwards impeached—Estoppel.]—See PRACTICE, 234.**

**398.—Distress—Payment of money into Court—Jurisdiction to determine rights of parties where liquidator's appointment invalid.]—See DISTRESS.**

## XXV.—MISCELLANEOUS.

**399.—Consent to judgment—Official agent.]—On 24th September, 1868, the National Bank of Australasia issued a writ on a bill of exchange against the Band of Hope Company, Registered. On the 18th September a special general meeting of the company passed a resolution that the action should not be defended, and an attorney was appointed to consent to judgment. On the 23rd September another writ was issued, the former having been abandoned, to recover the same debt. The attorney, without any fresh authority, consented to judgment, and execution was issued. The sheriff sold on 24th September, and the company received the proceeds of the balance of the sale. On the 29th October an order was made to wind up the company. On a summons at the instance of the official agent to set aside the judgment, it was *held*, that the company had precluded itself from setting aside the judgment by receiving the proceeds of the sale, and by not applying within the proper**



time. The official agent was in the same position as the company. *National Bank v. Band of Hope G.M. Co., Regd., A.R.*, 26th Nov., 1868.

V.

400.—Mining Companies Act 1871 (No. 400), sec. 48—Bill of sale.]—When a bill of sale is sealed and registered in accordance with Act No. 409, sec. 48, it is to be presumed that all preliminaries have been complied with. *Newey v. Rutherford, 3 V.L.R. (L.)*, 341. Banco (1877).

V.

401.—Companies Act 1890 (No. 1074), sec. 248.]—*Semle, per Williams and Holroyd, JJ.* :—The words “to be” in sec. 248 of the *Companies Act 1890* (No. 1074), have been inserted by error. *Haddow v. Duke Co.*, 18 V.L.R., 155. F.C. (1891-2).

V.

[NOTE.—See now Act No. 1348, rectifying the above mentioned error.]

402.—Companies Act 1890 (No. 1074), sec. 303—“In debt.”]—The words “in debt” in sec. 303 of the *Companies Act 1890* (1074), mean an existing unsatisfied liability. *Morley v. Gore*, 19 V.L.R., 199; 14 A.L.T., 117; 15 A.L.T., 27. F.C., *Williams, Holroyd and Hodges, JJ.* (reversing *a Beckett, J.*), (1892-3).

V.

403. —Solicitor—Authority to institute proceedings in client's name—Challenge to produce authority—Answer to suit—Costs.]—Defendants having a claim on plaintiff company, issued a writ to recover the amount, and the writ being returned *non est inventus*, took proceedings by way of foreign attachment under the *Absent Defendants Act*. W., who had acted as solicitor for the plaintiff company on previous occasions, refused to accept service of the writ originally issued by defendants, but, on defendants taking further proceedings, filed a claim in the name of the plaintiff company, and obtained an injunction *ex parte*, restraining defendants from proceeding with their action at law. On the motion to continue the injunction, defendants took the objection that W. had no authority to institute the suit, but *Manning, J.*, over-ruled the objection, and continued the injunction till the hearing. *Held*, on appeal, that the defendants had a right to call on W. to produce his authority, and that as he had failed to do so, the injunction must be dissolved, and the suit dismissed with costs as between solicitor and client, to be paid by W. *Hawkin's Hill G.M. Co. v. Briscoe*, 8

N.S.W.L.R. (E.), 123. *Stephen, Deffell and Owen, JJ.* (1887).

N.S.W.

404.—Debentures “secured upon the property of the company,” form of—Trust deed giving priority over subsequent encumbrances.]—The defendant company was formed with the object of acquiring certain lands for the purpose of coal mining, of exploring and working the mines thereon and elsewhere, of building and buying steamers, locomotives, &c., and of carrying on generally the business of colliery proprietors, to lend, invest, and otherwise deal with any moneys not immediately required for the purposes of the company, and to raise money by mortgage, debenture, or otherwise. The company was indebted to the plaintiffs in the sum of £20,359, and by Article 6 it was recited that, as regards that debt, it had been agreed to issue debentures, which, after two prior mortgages, amounting to £35,000, should constitute a first charge on all the property of the company. By Article 10, debentures were to be issued to the plaintiff for the sum of £20,359, payable at the end of ten years, and bearing interest at the rate of 6 per cent. per annum, in such form as the directors might determine. By Article 52, the directors had power, at their discretion, to borrow any sums of money for the purposes of the company, but so that the moneys so raised should not at any time exceed in the whole £10,000, except with the consent of a general meeting. In a suit brought by the plaintiffs against the company, with regard to the issue of the debentures, it was ordered that the debentures should be issued to be secured upon the property of the company, after the two prior mortgages. In pursuance of this decree the defendants proposed to issue to the plaintiffs debentures, purporting on the face of them to secure the amount thereof, subject to the two prior mortgages, and “to the business provided for under the articles.” *Held (per Owen, J.)*, that the words “and to the business provided for under the articles,” should be struck out; *per Darley, C.J.*, and *Innes, J. (Manning, J., diss.)*, over-ruling *Owen, J.*, that the plaintiffs were entitled (in addition to the debentures), to a trust deed, giving them priority over all subsequent charges upon the property of the company. *Robison v. Coal Cliff Land and Coal M. Co.*, 12 N.S.W.L.R. (E.), 293 (1891).

N.S.W.

404a.—Contract—Construction—Sale of min-



ing lease—Payment when company formed.]—A contract for the sale of a mining lease acknowledged the payment of £50, and provided that the balance should be paid when a company was formed and satisfactorily in existence. *Held*, under the circumstances of the case, that "company" did not mean a registered company. *Vitnell v. Simpson*, 9 N.S.W.W.N., 45. *Darley, C.J., Innes and Stephen, JJ.* (1892). N.S.W.

404b.—Execution on foreign judgment—Company registered in Victoria—Assets in New South Wales.]—Order made to issue execution in New South Wales under Act 19 Vic. No. 12, on a judgment obtained in Victoria by a married woman against a no-liability company registered in Victoria, but whose land was in New South Wales. *Dean v. Rising Moon G.M. Co.*, 10 N.S.W.W.N., 77. *Foster, J.* (1893). N.S.W.

404c.—Dissolved company—Wrong proceedings by solicitor—Costs.]—Where a solicitor caused an application to be made nominally in the name of a company which had been dissolved, he was made to personally bear the costs of the application. *Selfe v. Colonial Ice Co.*, 8 N.S.W.W.N., 153. *Owen, J.* (1894).

405.—Solicitor and client—Unauthorised proceedings in company's name—Costs against solicitor on the record—Practice.]—Certain persons claiming to be directors of a company commenced a suit in the company's name against the acting directors to determine which body was rightly appointed. After some interlocutory applications had been made in the suit, the plaintiff abandoned the proceedings, and the defendants thereupon moved in their own name to dismiss the suit for want of prosecution. They also asked for costs against the solicitor on the record for the plaintiff, as having used the company's name without authority. *Held*, that the defendants had had two modes of protecting themselves: (1.) By applying in their own name for security for costs. (2.) By applying in the company's name for dismissal of the suit as unauthorised, and that as they had not adopted either course, the order for costs could only be made against the nominal plaintiff. *Hawkin's Hill G.M. Co. v. Briscoe*, 8 N.S.W.L.R. (E.), 123; and *Selfe v. Colonial Ice Co.*, 10 N.S.W.W.N., 153, distinguished. *South Burragong G.M. Co. v. Gough*, 15 N.S.W.L.R. (E.), 113; 11 W.N., 52. *Manning, J.* (1894).

N.S.W.

405a.—Debenture—Floating security—Bill of sale—Lien ticket—Goldfields Act 1874 (38 Vic. No. 11), Regulation 38—Foreclosure—Form of order.]—A limited company, by six debentures at different dates, charged all its present and future real and personal property and interest in lands, and all its plant, machinery, debts, goodwill, chattels, effects and assets, and generally all its property real and personal, for the repayment of the sums and interest secured thereby. The debentures were to be a floating security, and the moneys so secured were to be payable if default were made in payment of principal or interest for twenty-one days. A bill of sale was subsequently given by the said company over certain machinery and plant as collateral security to the said debentures, and a lien ticket under Regulation 38 of the *Goldfields Act* 1874, was also given as security collateral with the bill of sale. Default having been made in the payment of interest in the first debenture, application was made for foreclosure in all the property comprised in the debentures, bill of sale and lien ticket. A declaration of charge and a direction for inquiry and account were made, and in default of payment, the company was ordered to do all acts and execute all conveyances necessary for vesting in the plaintiff the property comprised in the debentures, bill of sale and lien ticket. *Sadler v. Worley* (1894), 2 Ch., 177, followed. *Poyser v. Mt. Shamrock G. Co. Ltd.*, 6 Q.L.J., 276. *Real, J.* (1895). Q.

406.—Rash and hazardous speculation.]—The purchase of gold mining shares is a rash and hazardous speculation, but where the case is not a gross one it can be dealt with sufficiently, if need be, when the bankrupt applies for his discharge. *In re Allen*, 11 N.Z.L.R., 133. *Williams, J.* (1892). N.Z.

407.—Mining Companies Act 1871, sec. 35—Proceeding by summons or by plaint.]—See PRACTICE, 467.

408.—Service of summons on company.]—See PRACTICE, LXI.

409.—Mining Statute 1865 (No. 291), sec. 163—Inspection of books of company not party to suit.]—See PRACTICE, 143.

410.—Company—Security for costs—Poverty.]—See PRACTICE, 115, 116.

411.—Suing wrong defendant—Absent Defend-

ants Act—Agent of mining company.]—See PRACTICE, 193.

412.—Company—Shareholder in—Perjury—Materiality—Admissibility of minute book and depositions.]—See CRIMINAL LAW.

413.—Absent Defendants Act—Foreign corporation.]—See PRACTICE, 166.

414.—Goldfields Act 1866, sec. 22—Dispute “regarding” partnership—Action by holders of miners’ rights and shareholder against manager also a shareholder—Costs—Jurisdiction of justices.]—See PRACTICE, 119.

415.—Fraud—Partnership—Money had and received—Accounts.]—See FRAUD.

416.—Privy Council appeal—Practice.]—See PRACTICE (APPEAL).

417.—Solicitor’s authority to institute proceedings—Costs.]—See COMPANY (SEAL); SOLICITOR; ATTORNEY.

418.—Residence—District Court—22 Vic. No. 18, sec. 5.]—See PRACTICE, 151.

419.—Service of writ—Foreign company—Practice.]—See PRACTICE (SERVICE).

420.—Award by umpire—Declaration under sec. 113 of Companies Act.]—See ARBITRATION, 8.

421.—Arbitration Act 1892 (N.S.W.), secs. 12, 24—Declaration under Companies Act, sec. 113—Costs.]—See ARBITRATION, 5.

422.—Arbitration Act 1892 (N.S.W.), secs. 12, 24—Companies Act, sec. 113—Effect of Arbitration Act on arbitrators under other Acts.]—See ARBITRATION, 6.

423.—Companies Act 1864—Cheques or orders—Bill of exchange—Notice of dishonour—Acceptance by secretary.]—See BILL OF EXCHANGE.

## COMPENSATION

1.—Mining on Private Property Act 1884 (No. 796), secs. 18, 22, 27—Claim for compensation—Procedure.]—The proceedings under sec. 18 of the *Mining on Private Property Act 1884* (No. 796), by the owners of land taken possession of under the Act, to ascertain the amount of compensation to which they are entitled, is not a

suit requiring a plaint. The proceedings for setting down the case sufficiently make the applicant a party. The Court of Mines may proceed without his presence if he neglect to attend, and should assess the damages upon the evidence submitted by the owner and applicant, if they attend, or by either, the other not attending, and may award costs to or against the owner, occupier, or applicant, which may be enforced under the *Mining Statute 1865* (No. 291), sec. 146. *In re The Mining on Private Property Act 1884, and a Claim for Compensation by the Trustees, Executors and Agency Co. Ltd.*, 11 V.L.R., 717. *Molesworth, A.C.J.* (1885). V.

2.—Mining on Private Property Act 1884 (No. 796), secs. 18, 19, 21—Assessing amount of compensation—Jurisdiction of Warden to state special case.]—In assessing the amount of compensation to be awarded to the owners of land under the *Mining on Private Property Act 1884* (No. 796), a Warden acts in his judicial capacity as Warden, and not as a mere *persona designata* for assessing compensation. He may, therefore, as such Warden, state a special case under the *Mining Statute 1865* (No. 291), for the opinion of the Court. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

3.—Mining on Private Property Act 1884 (No. 796), secs. 4, 31—Leases granted under Act—Right of renewal—Compensation.]—All mining leases granted in pursuance of the provisions of the *Mining on Private Property Act 1884* (No. 796), carry with them the right of renewal under sec. 31; and the Warden has power to determine the amount of compensation in the case of a proposed renewal of a lease granted under sec. 4. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

4.—Mining on Private Property Act 1884 (No. 796), secs. 16, 17, 31—Computation of compensation—Prospective value of land during currency of lease.]—In assessing compensation under sec. 16 of the *Mining on Private Property Act 1884* (No. 796), a Warden may take into consideration the probable prospective increase in surface value by reason of the land becoming available for any purpose to which the surface might, but for the lease, with reasonable probability be applied during its currency. But he must not

consider the condition of the underground workings or the value of the timber in them. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

5.—*Mines Act 1890 No. 2 (No. 1202)*, secs. 4, 5, 6, 7, 8, 9—*Mines Act 1891 No. 2 (No. 1251)*, secs. 5, 6, 19—Applicant for mineral lease—Right to have compensation determined.]—An applicant for a lease under sec. 5 of the *Mines Act 1891 No. 2 (No. 1251)*, not being the holder of a lease, is entitled to proceed by complaint to have the amount of compensation for surface damage determined in the manner provided by secs. 6, 7 and 8 of the *Mines Act 1890 No. 2 (No. 1202)*. *Bellamy v. Hopkins*, 19 V.L.R., 34; 14 A.L.T., 238. *Hodges, J.* (1893). V.

6. — *Mines Act 1890 (No. 1120)*, sec. 315 — Appeal from Warden — Compensation.] — No appeal lies to a Court of Mines from the decision of a Warden fixing the amount of compensation in cases coming within the provisions of sec. 315 of the *Mines Act 1890 (No. 1120)*. *Wheeldon v. Parkin*, 20 V.L.R., 60; 15 A.L.T., 207. *Hood, J.* (1894). V.

7.—*Mines Act 1890 No. 2 (No. 1202)*, secs. 6, 7, 8—*Mines Act 1891 No. 2 (No. 1251)*, sec. 5—Applicant for lease—Right to have compensation determined.]—An applicant for a lease under sec. 5 of the *Mines Act 1891 No. 2 (No. 1251)*, is entitled to proceed by complaint to have the amount of compensation for surface damage ascertained as provided for by secs. 6, 7 and 8 of the *Mines Act 1890 No. 2 (No. 1202)*. *Bellamy v. Hopkins*, *supra*, approved. *Moe Coal M. Co. Ltd. v. Lühgow*, 20 V.L.R., 80; 15 A.L.T., 222. *F.C., Madden, C.J., Holroyd and Hodges, J.J.* (1894). V.

8.—*Mines Act 1890 No. 2 (No. 1202)*, secs. 2 (a) (b), 4, 5, 6, 7 (1)—Holder of miner's right—Assessment of compensation for surface damage—Jurisdiction of Warden.]—A Warden has jurisdiction under the *Mines Act 1890 No. 2 (No. 1202)*, to determine the amount of compensation for surface damage to be paid by the holder of a miner's right to the owner, &c., of the land entered on by the holder of a miner's right for the purpose of mining thereon. *Walsh v. Parslow*, 17 A.L.T., 313. *Madden, C.J.* (1896). V.

9.—Compensation for lands taken — Mineral contents of land — Onus probandi—Practice as

to new trial.]—Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal thereunder, assessed damages in respect thereof: *Held*, that their verdict, being one which a jury could reasonably find, could not be set aside as against the weight of evidence. There is no rule which imposes upon a plaintiff in order to sustain such verdict, the burden of proving, by costly experiments, the mineral contents of his land; nor does it follow that because a seam of coal is not presently workable at a profit that no compensation is to be given for it if it is likely to prove profitable in the future. Order of the Supreme Court of N.S.W. for a new trial set aside. *Brown v. Commissioner for Railways*, 15 App. Cas., 240; 59 L.J.P.C., 62; 62 L.T., 469; 7 N.S.W.W.N., 113. *J.C., Lords Watson, Macnaghten and Morris, and Sir Barnes Peacock* (1890). N.S.W.

10.—Right of claimholders to compensation for damages by construction of a tall-race passing through the bounds of their race—Right to deposit forkings on the bounds of a race.]—See *Bokning v. Carroll*, 1 N.Z.J.R. (N.S.) M.L., 47. N.Z.

11.—*Mining Act 1886 (50 Vic. No. 51)*, (N.Z.), sec. 217—"Person employed"—Tributer.]—A tributer in a mine is not a "person employed" in a mine within the meaning of sec. 217 of the *Mining Act 1886 (50 Vic. No. 51)*. The words in that section "person employed," imply the relationship of employer and employé. *Hoskings v. Caledonian G.M. Co. Ltd.*, 7 N.Z.L.R., 756. *Prendergast, C.J.* (1889). N.Z.

12.—Compensation—Improvements—Suspension of pastoral lease—*Mining Act*, sec. 13.]—See CROWN LANDS.

## COMPROMISE

See COMPANY, 321.

## CONDITIONS

See BY-LAWS AND REGULATIONS; CLAIM; FORFEITURE; LEASE; TRIBUTE.

1.—License of auriferous land—Condition to enclose with good and substantial fence.]—See LICENSE.

2.—Labour—Quartz prospecting area—Forfeiture.]—See CLAIM, 28.

3.—Water license—Exception for irrigation purposes.]—See LICENSE.

4.—Prospecting claim—Cancellation of certificate—"Prescribed conditions."]—See CLAIM, 38.

5.—License to use water—Conditions.]—See WATER.

## CONDITIONAL PURCHASE

1.—Mineral—Goldfield—Ejectment.]—See CROWN LANDS.

2.—Mineral—Reserve—Rescission—Measured portion—Crown Lands Alienation Act 1861.]—See CROWN LANDS.

3.—Mineral—Corporation cannot make—"Person."]—See PRACTICE, 341.

## CONSENT

Pastoral lease—Occupation license—Consent of tenant.]—See LICENSE.

## CONSIDERATION

Consideration for mining lease—Labour covenants.]—See LEASE.

## CONSTITUTIONAL LAW

1.—Reference by Government to arbitrators to ascertain sum to be placed on the Estimates—Action on award—Ultra vires—Goldfields Acts.]—See ARBITRATION, 1.

2.—Crown lease—Great seal of province (S.A.)—Power of Supreme Court.]—See LEASE.

## CONSTRUCTION

See BY-LAWS; COMPANY; STATUTE; WORDS.

1.—Statutes—Marginal notes—Prior legislation.]—See STATUTE.

2.—Words whether used in ordinary or technical sense—"Span"—Statutory contract.]—See STATUTE.

3.—Articles of association—Director's remuneration—"Realised profits."]—See COMPANY, 3.

## CONTEMPT

See PRACTICE, X.

## CONTRACT

See COMPANY; FORFEITURE; PARTNERSHIP; SPECIFIC PERFORMANCE.

1.—Agreement.]—The Band of Hope and Kohinoor Companies entered into an arrangement for the division of a portion of auriferous land between them. The arrangement was made by deputations from each company, and reduced by them to writing. A consent decree of the Court of Mines to carry out the arrangement was agreed upon. A plan showing the division of the ground was referred to by the decree. It was afterwards ascertained that the plan was incorrect. *Held*, that the consent decree amounted merely to minutes of a decree and was subject to alteration by either party; that as the minutes of decree did not carry out the contract they were not finally binding. *Held* further, that although one of the parties was misled, yet as there was no fraud, the agreement should not be disturbed on that ground. *Nicholas v. James*, 1 W. & W. (L.), 255. *Banco* (1862). V.

2.—Contract—Auriferous sand—Construction—Measure of damages.]—A company contracted with W. to allow him "to collect, clean and take away all mundic, sand and pyrites from the company's battery after the mundic, sand and pyrites had passed from the tables and amalgamating barrels and outside the company's battery house," at so much per ton. They had not then, and did not erect any amalgamating barrels, but used blanket tables; and some time after the agreement, instead of allowing the sand to pass from the tables outside the battery house, saved the sand from them, and extracted the gold from it, allowing none of the sand to go to the plaintiff. *Held*, that under this agreement, the plaintiff

was entitled to all the sand after it had passed over the tables and through the amalgamating barrels; but that the measure of damages for breach of the agreement, was not the value of the sand saved from the tables, but the hypothetical value such sand would have had, after having been passed through amalgamating barrels. *Wilson v. Rising Star Q.M. Co. Ltd.*, 7 V.L.R. (L.), 274. *Stawell, C.J., Stephen and Higinbotham, J.J.* (1881). V.

3.—What part performance takes contract out of Statute of Frauds.]—Where a person was actually mining for gold under a contract with a mining company as to four acres, which he erroneously supposed to be valid at law, and he then entered into a second contract as to ten acres, which included the four, and continued mining only in the four, and in no way varying his manner of working, or of money-dealing with the company: *Held*, this was not such a part performance, as to the second contract, as to take it out of the *Statute of Frauds*. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C., *Stawell, C.J., Molesworth and Williams, J.J.* (reversing *Higinbotham, J.*), (1881-2). V.

4.—Mining Statute 1865 (No. 291), sec. 101, sub-sec. 6—Contract within meaning of section.]—Certain persons, five in number, held a mining tenement. Two of these persons disposed of their interests to the G. Company. The G. Company desired to enter into possession, but were not allowed to do so by the other three owners. Before the transfer to the company took place, the complainant was employed by the five owners of the ground to do certain work, the payment for which he now claimed from the G. Company and the three other owners of the mine. *Held*, that there was no contract so far as the G. Company was concerned, and that the complainant could not recover from them. *Reg. v. Philips, ex parte Granya Co.*, 6 A.L.T., 13. *Williams and Holroyd, J.J.* (1884). V.

5.—Contract for delivery of ore by mining company to smelting company—Breach of contract—Measure of damages—Profits of smelter.]—In an action by a smelting company against a mining company for damages for non-delivery of weekly instalments of ore, pursuant to a contract, the measure of damages is not the difference between the contract, and the market price of the ore not delivered, but the loss actually

sustained, it appearing that the contract was one by which machinery and skilled labour were to be applied by the plaintiffs to the treatment of ore of a certain character, to be paid for at a price fixed by reference to the value of its estimated products when treated, and the expected profitable use of the plaintiff's machinery and labour being the inducement to contract, and it being also uncertain whether the plaintiffs could have obtained in the market ore of the grade or grades required, in any specified quantity, at any particular time. *Australian Smelting Co. Ltd. v. British Broken Hill Proprietary Co. Ltd.*, 22 V.L.R., 190; 18 A.L.T., 64; 2 A.L.R., 173. F.C., *Holroyd and a'Beckett, J.J.* (*Hood, J. diss.*), reversing *Hodges, J.* (1895-6). V.

6.—Contract—Delivery of coals on board vessel—Construction.]—In a contract to deliver coals on board a vessel there is an implied contract to deliver the same with care, but it is no portion of that contract to distribute them when delivered on board. *Brown v. Waratah Coal Co.*, 5 N.S.W.S.C.R. (L.), 238. *Stephen, C.J., Hargrave and Cheeke, J.J.* (1866). N.S.W.

7.—Contract—Terms in writing—Acceptance implied from conduct—Manager—Dismissal of mining engineer—Pleading.]—In an action for breach of an agreement between the manager of a mining company and an engineer, by which it was provided that the manager should be at liberty to cancel the said agreement in case he should be of opinion that any unnecessary delay was taking place in the carrying through or completing the work, the defendant pleaded in justification, first, that there was—and, secondly, that he was *bond fide* of opinion that there was such unnecessary delay on the part of the plaintiff. The judge presiding at the trial refused to direct the jury, that the defendant might avail himself of any ground of dismissal which the evidence showed to have existed, whether known to the defendant at the time of the dismissal or not. *Held*, that, upon the pleadings, the judge was right in so refusing, the agreement being evidenced by a unilateral undertaking, accepted by the defendant. This case distinguished from *O'Sullivan v. Aarons*, 5 S.C.R. (L.), 353 (1866), and *Grimley v. Flood*, 9 S.C.R. (L.), 265 (1870). *Haughey v. Deane*, 10 N.S.W.S.C.R. (L.), 264. *Stephen, C.J., Hargrave and Cheeke, J.J.* (1871). N.S.W.

8.—Sale of gold mine—Memorandum indorsed—Not set out in declaration—Oral contract accepting paid-up shares in lieu of cash—Statute of Frauds.]—Plaintiff declared on a contract in the following terms :—"Memorandum of agreement made this 10th day of July, 1872, between C.O.B., T.H.P., W.A., I.N., R.T., C.A., and T.P., of Grenfell, in the colony of N.S.W., shareholders in a certain gold mining reef situate at Grenfell, and recently registered by them as the 'Phoenix Co.,' of the one part; W.J.W. and T.W., of Young, in the said colony, general merchants, of the other part. Whereas negotiations have been pending between the parties hereto for the purchase and sale of the mine, shares, property, and appurtenances belonging to the said 'Phoenix G.M. Co.,' situate as aforesaid, which includes the lease which was formerly known as O.B.'s two acre lease, with the addition of two other acres since taken up by the said company, at and for the consideration hereinafter expressed; and whereas it has been agreed to keep the said purchase open to the said W.J.W. and T.W., solely to them for a period of four weeks from the date hereof, in order to enable them, the said W.J.W. and T.W., to effect certain necessary arrangements in floating the said company. Now this indenture witnesseth that in consideration of the said W.J.W. and T.W. using their endeavours to float the said company, they, the said C.O.B., T.H.P., W.A., I.N., R.I., C.A., and T.P., do hereby for themselves, individually as well as collectively, as shareholders of the Phoenix Company aforesaid, promise and agree, to and with the said W.J.W. and T.W., to keep open for sale to them for four weeks from the date hereof, and for the purposes aforesaid, and at any time within that period when called upon so to do by them, legally assign, transfer, set over, and convey unto the said W.J.W. and T.W., all that the said gold mine as aforesaid, known as the Phoenix Gold Mine, together with all their right, title, interest, claim or demand therein, or thereto, for the sum of £4,000 sterling, payable by the said W.J.W. and T.W. in manner following, that is to say—the sum of £2,000 in cash at the execution by the shareholders of the Phoenix Company of the legal sale and transfer of the said mine and claim to them, the said W.J.W. and T.W., and a further sum of £2,000 sterling one month from the date of such purchase as aforesaid. Provided always that if the said W.J.W.

and T.W. shall be unable to float the said company as anticipated within four weeks from the date hereof, a notice in writing to this effect to the parties hereto shall declare the obligations of this agreement to be at an end, and the same shall thereupon cease and become void. (Signed) Watson Bros. Witness, W.M.V." Upon that contract, the following memorandum was indorsed :—"Memorandum by way of indorsement to the written agreement, that we, the undersigned parties thereto and hereto hereby agree and undertake upon the floating of the said company, to take 2,000 shares thereof at £1 per share, and to pay all calls as required, and to conform to the general conditions of the company. The said company to consist of a capital of 12,000 shares of £1 per share, to include a quartz-crushing machine now in the occupation of Mr. R.M.V., of Grenfell, or some quartz-crushing machine of similar value and power; £2,000 to be appropriated out of the capital of the company to go towards the working expenses of the same. (Signed), Watson Bros. Witnesses, R.M.V., S.H.W." The indorsed contract was not set out in the declaration. An oral contract was also declared on that "The plaintiffs agreed to accept £2,000 worth of paid-up shares from the defendants in lieu of £2,000 cash." Defendant pleaded (*inter alia*), the *Statute of Frauds*. Held, on motion to set aside a nonsuit :—(1.) That the indorsement in the original agreement was a separate, collateral and independent agreement, and that, whether so or not, as it did not in any way qualify, alter or affect that first agreement, it need not have been, and ought not to have been noticed in the declaration. (2.) That it was a collateral undertaking by each party to take 2,000 shares out of 12,000 shares on the same terms as other persons of the general public taking shares in the company in the undertaking by the defendants, as the promoters, that the company should consist of 12,000 shares only, and that they would make over a crushing-machine to the company, and leave £2,000 cash with the company for working expenses. (3.) That the agreement by plaintiffs to accept paid-up shares from the defendants to the amount of £2,000, in lieu of the balance of £2,000 cash, must in the record as it now stands, be taken to have been oral only; for as the *Statute of Frauds* is pleaded to that portion of the declaration, and the plaintiffs have not taken issue on that allegation, such is the inevitable

conclusion from the pleadings. (4.) That this being so, the oral agreement goes for nothing—cannot be proved at all, and is therefore entirely inoperative, as if it never existed. So that the plaintiffs' claim for £2,000 cash stands absolute and indefeasible. Also, that the oral agreement respecting the substitution of paid-up shares for cash being inoperative, both at law and in equity, could not be relied on or taken advantage of by the defendants by plea, any more than it could have been relied on by the plaintiffs as affecting their cause of action. On a motion to set aside a nonsuit (leave being reserved), a new trial granted. *O'Brien v. Watson*, 12 N.S.W.S.C.R. (L.), 294. *Stephen, C.J., Hargrave and Fancett, JJ.* (1873-4).

**9.—Statute of Frauds—Interest in land—Parol agreement—Partnership—Interest in land taken up under Mining Act 1874, a chattel interest.]—**Two of the plaintiffs, and the defendant J.R., verbally agreed to form a syndicate of ten persons to acquire a mineral lease. A syndicate was formed accordingly, and the land taken up under the provisions of the *Mining Act 1874*, in the names of J.R. and J.W., upon a verbal agreement that the land should belong to the ten members of the syndicate in equal shares. J.R. subsequently claimed a one-third interest, and, to a suit brought for a declaration that J.R. was entitled to no more than one-tenth, and for consequential relief, J.R. pleaded the *Statute of Frauds*. Held, per *Owen J.*, that the arrangement being to form a partnership, the terms of it could be proved by parol evidence. Meaning of "syndicate." Held, on appeal, that by virtue of sec. 18 of the *Mining Act 1874*, all interests in land created by that Act are personalty, and do not come within the *Statute of Frauds*. Judgment of *Owen, J.*, affirmed. *Williams v. Robinson*, 12 N.S.W.L.R. (E.), 34. *Darley, C.J., Innes and Stephen, JJ.* (1890).

**10.—Contract—Enforcement of by third party, a stranger to the contract—Relation of trustee and cestui que trust.]—**By an agreement made between F. and W., it was agreed that a mineral lease which was to issue in the name of F. should be held by F., as the joint property of F. and W., but that the sum of £250 should be a first charge on the proceeds of the land in favour of F. A caveat was thereupon filed by W. against dealings with the land to the detriment of his interest. Subsequently, F. and W. agreed to

sell this land to a company, and to receive shares in the company in lieu of the purchase-money, and the company took the land with notice of the terms of the original agreement between F. and W. The caveat filed by W. was not, however, removed. The company subsequently agreed with W. that, in consideration of his removing the caveat, the company would pay to F. the £250, "in accordance with the terms of the agreement between F. and W., wherein it was agreed that that sum should be a first charge on the land" in question. In a suit by F. to enforce the agreement between W. and the company, it was held by *Owen, J.*, that as the agreement was to pay out of the proceeds of the land, and W. made the agreement as trustee for F., the case fell within the principle of *Gregory v. Williams*, 3 Mer., 582, and F. was entitled to succeed. But, held, by the Full Court (reversing the decision of *Owen, J.*), that the relationship of trustee and cestui que trust did not exist between F. and W., and that F. could not enforce the contract. Held, also, that the agreement between W. and the company was without consideration, as the caveat had lost its vitality upon the sale by F. and W. to the company. *Foster v. Genovian Shale Co. No Liability*, 16 N.S.W.L.R. (E.), 59; 11 W.N., 142, 182. *Darley, C.J., Innes and Manning, JJ.* (1894-5).

N.S.W.

**11.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32)—Statute of Frauds—Power of Warden to enforce contract not complying with.]—**A Warden could under sec. 68 of the *Goldfields Act 1866*, enforce a contract, notwithstanding that the provisions of the *Statute of Frauds* had not been complied with. *Doherty v. Atkins*, 1 N.Z.J.R. (N.S.) M.L., 2. N.Z.

**12.—Partnership to work mineral lands—Agreement to consign auriferous quartz and keep leases valid.]—**See PARTNERSHIP.

**13.—Shares—Mining company—Rescission.]—**See COMPANY, 226.

**14.—Sale of shares—Undisclosed principal—"Sold" note.]—**See COMPANY, 227.

**15.—Pleading—Collateral provisions—Consideration—Transfer of gold mine—Fraud—Evidence.]—**See PRACTICE, 313.

**16.—Infant—Share in mining claim—Transfer.]—**See MINING ACT 1874.



17.—Paid-up shares—Companies Act, sec. 57—Broker—Stock Exchange.]—See COMPANY, 229.

18.—Shares—Loan or sale—Specific performance.]—See COMPANY, 232.

19.—Companies Act (N.S.W.), sec. 57—Paid-up shares—Filing—Need not be under seal of company.]—See COMPANY, 233.

20.—Sale of severed chattels—Contract involving continuous acts—Damages.]—See SPECIFIC PERFORMANCE.

21.—Sewer construction—Assignment—Mortgagee's right to keep security alive.]—See MORTGAGE, 11.

22.—Companies Act 1874 (N.S.W.), secs. 57, 212—Reconstruction—Shares registered.]—See COMPANY, 237.

23.—Trustee for proposed company—Registered contract—Companies Act (N.S.W.), sec. 57.]—See COMPANY, 239.

24.—Sale of shares—Disclosed principal.]—See COMPANY, 240.

25.—Restraint of trade—Directors handing over control of company's business—Ultra vires.]—See COMPANY, 283.

26.—Shares issued as paid up—No registered contract—Extent of liability.]—See COMPANY, 241.

27.—Sale of mine—No-liability company—Option to rescind—Power of directors.]—See COMPANY, 131.

28.—Application for exchange of freehold lands—Crown Lands Act 1889 (N.S.W.), sec. 46—Approval of Minister—Concluded contract.]—See CROWN LANDS, 22.

29.—Masters and Servants Act 1863, sec. 16—Agent—Injunction—Winding up.]—See EMPLOYER AND EMPLOYEE.

30.—Sale of shares in mining company—Tender of paid-up contributing shares in lieu of promoter's shares.]—See COMPANY, 250.

31.—Executory—Interest in mining syndicate—Stamps Act 1886 (S.A.).]—See STAMPS.

## CONTRIBUTING SHARES

See COMPANY, XX.

## CONTRIBUTION

See COMPANY, XX., XXIV.

## CONTRIBUTORIES

See COMPANY, XXIV.

## CONTRIBUTORY NEGLIGENCE

Regulation of Mines Act 1877 (No. 583), secs. 6, 12—Negligence—Mining accident—Contributory negligence.]—See NEGLIGENCE.

## CONVERSION

1.—Conversion of auriferous earth—Evidence of property.]—In an action for conversion of auriferous earth, possession of the site, comprised in a mining lease from the Crown, from which the earth has slipped, is *prima facie* evidence of property in the earth, and it is not necessary regularly to prove a title from the leasees. *Clayton v. Morrison*, 2 N.Z.C.A., 263. *Arney, C.J., Gresson, Richmond and Chapman, JJ.* (1873). N.Z.

2.—Conversion—Mining tenement—Mining Act 1874 (N.S.W.), sec. 18.]—See PRACTICE (PLEADING), 321a.

## CONVEYANCE ON SALE

Interest in mining syndicate—Stamps Act 1886 (S.A.).]—See STAMPS.

## CO-OWNERS

“Syndicate”—Partnership—Mining partnership.]—See PARTNERSHIP.

## CORPORATION

1.—Mineral conditional purchase—25 Vic. No. 1 (N.S.W.), secs. 13, 14—“Person.”]—See PRACTICE, 341.



2.—Residence—Branch office—Service of writ—Manager.]—See PRACTICE, LXI.

3.—20 Vic. No. 28 (N.S.W.)—Agreements Validating Act—Coal miner—Employer and employee.]—See EMPLOYER AND EMPLOYEE.

## COSTS

See COMPANY, XII., XXV., 8, 172, 315, 341, 372, 384a; FORFEITURE; INSPECTION MINER'S RIGHT; MORTGAGE; PRACTICE, XI.

## COUNTY COURT

See PRACTICE, XII.

## COURT OF MINES

See PRACTICE, IV., XIII.

## COVENANT

See FORFEITURE; LEASE.

1.—Mining Lease—Labour covenants—Consideration.]—*Per Higinbotham, J.*—The labour covenants in a gold mining lease are the real consideration for the lease, and should be strictly construed. *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.), 70, 78, 79; 3 A.L.T., 121 (1882).

V.

2.—Mining Statute 1865 (No. 291), secs. 101, 177, 195—Lease—Non-compliance with labour covenants—Warden's jurisdiction to make declaratory order.]—A Warden has no jurisdiction to make a merely declaratory order that the holder of a mining lease has not complied with the labour covenants contained in it. *Ives v. Lator*, 13 V.L.R., 941; 9 A.L.T., 98. *Webb, J.* (1887).

3.—Lease—Non-compliance with labour covenants—Forfeiture.]—A holder of a miner's right cannot maintain proceedings to obtain possession of land held under a gold mining lease, as upon an alleged forfeiture for breach of the labour covenants, until the lease has been by the Governor-in-Council declared forfeited. *McMillan v. Dillon*, 6 V.L.R. (M.), 15 (see

FORFEITURE, 45), explained. *Ives v. Lator*, 13 V.L.R., 941; 9 A.L.T., 98. *Webb, J.* (1887).

V.

4.—Mine worked according to covenants in lease—Subsidence of surface.]—See LEASE, 79.

5.—Covenant in lease to keep accounts—Neglect to do so—Presumption.]—See LEASE, 80.

## CREEK

See LEASE; MUNICIPALITIES; WATER.

## CREEK CLAIM

Creek claim—Definition of banks by Warden.]—See CLAIM, 42.

## CRIMINAL LAW

STEALING—See MINE.

1.—Criminal Law and Practice Statute 1864, sec. 104—Mine, bed, or vein—Laying property in information.]—The *Criminal Law and Practice Statute* 1864, sec. 104, enacts that whoever shall steal, or sever with intent to steal any gold from any mine, bed, or vein thereof, shall be guilty of felony. *Held*, that an information under this section was sufficiently proved by showing that the gold taken had been removed from its natural position (*in situ*), and that the separation of the gold by particles of earth did not render it less a bed or vein. Gold when found is always separated by something, earth or quartz or rock; it is only a question of degree. *Reg. v. Davies*, 6 W.W. & A'B. (L.), 246; N.C., 65. *Banco* (1869).

V.

2.]—D. was tried for stealing gold under the *Criminal Law and Practice Statute* 1864, sec. 104. The information contained one class of counts laying the property of the gold in the Crown, and another class of counts laying the property in the Bonshaw Company, who were the owners of the land from which the gold was taken. The prisoner was found guilty on all the counts. It was contended on behalf of the prisoner that as substantially he was charged with having committed only one class of offence, it was inconsistent he should be found guilty of having committed two. *Held*, that this was at most two good findings on two good counts. The offence was one, and one only—"stealing," and for that offence, though formally judgment

would be pronounced on each count, substantially only one punishment would be awarded. *Ibid.*

V.

3.—False pretences.]—A. and B., gold diggers in partnership, went together to C.; A., in the presence of B., saying to C. "we have a bit of gold for sale," or, "I have a bit of gold for sale." Shortly afterwards, both being together, A. produced a bag of metal resembling gold, and B. cleaned it, taking away some sand, &c., from the metal. C. then bought the whole, supposing it to be gold, and paid for it as such; one-third of the metal was brass. *Held*, that A. and B. were guilty of obtaining money under false pretences. *Reg. v. Elsworth and Corcoran*, 1 N.S.W.S.C.R. (App.), 24. *Stephen, C.J.*, delivered the judgment of the Court (1854).

N.S.W.

4. — Perjury — Materiality — Shareholder in mining company—Evidence—Minute book.]—In a trial for perjury alleged to have been committed in a case where the prisoner (as a member of a gold mining company), was sued by one Berryman under the *Masters and Servants Act* for wages accrued due since the preceding April, the prisoner swore that he never was a member of the company in question. *Held*, that the evidence was material, and that perjury could be assigned upon it. It was proved that there was a written complaint and summons, but neither were produced; but a minute book which contained an entry—"Berryman v. Cohen, Wages. Plea, never indebted"—and also the whole of the depositions of the witnesses signed by them, and the sentence of the justice signed by him, was received in evidence to show that there was a case pending, over which the justices had jurisdiction. *Held*, that the evidence was properly admitted. *Reg. v. Cohen*, 3 N.S.W.S.C.R. (L.), 348. *Stephen, C.J.*, and *Wise, J.* (1864).

N.S.W.

5.—Larceny—"Gold ore"—"Mine" of the Queen — 7 & 8 Geo. IV. c. 29, sec. 37.]—An information framed under 7 & 8 Geo. IV. c. 29, sec. 37, contained eight counts. In the 1st count the prisoners were charged with stealing "gold ore," the property of the Queen, from a "mine of gold ore," the property of the Queen. In the 2nd count they were charged with stealing "ore of a certain metal," to wit, washdirt containing gold, the property of the Queen, from a certain "mine" of the Queen. In the 3rd and 4th counts they were charged in the same way, but

with "severing with intent to steal," instead of with actually stealing. The remaining counts, which were abandoned at the trial, differed from those mentioned, in that the property was alleged to be in "Andrews and party," instead of in the Queen. On the prisoners being found guilty, the following points were reserved for the consideration of the Court:—(1.) That there was no evidence that what was taken away was "ore." (2.) That the property was wrongly laid in the Queen. (3.) That as the Queen does not in practice claim the gold, there can be no felonious stealing of it. *Held* (*Martin, C.J., diss.*), that there was evidence that what was taken away by the prisoners was "ore" within the meaning of 7 & 8 Geo. IV. c. 29, sec. 37. *Held* also (*Hargrave, J., diss.*), that 7 & 8 Geo. IV. c. 29, as far as it related to gold, was repealed by 20 Vic. No. 29. *Held* also (*per Martin, C.J.*), that larceny cannot be committed of gold belonging to the Crown, by virtue of its prerogative, while it is not yet detached from the mine, or in other words, not yet formed or seized. *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258. *Martin, C.J.*, *Hargrave* and *Faucett, JJ.* (1874).

N.S.W.

6.—Stealing ore of company—Proof of incorporation.]—The prisoner was indicted for stealing ore, the property of the New Reform Company, Limited. At the trial there was no strict proof of the incorporation of the company, but witnesses stated that it was an incorporated company, and that it had been carrying on business for some years. *Held*, that strict proof of incorporation was not necessary. *Reg. v. Bower*, 5 N.S.W.W.N., 28. *Darley, C.J.*, *Windeyer* and *Innes, JJ.* (1888). N.S.W.

7.—Evidence and Discovery Act (31 Vic. No. 13, sec. 64)—Untrue representation—Confession.]—M. was charged with having stolen certain gold, the property of the Mount Morgan Company. G., a private detective, who had gained M.'s confidence, gave evidence that he told M. he came from South Africa, and had done business in diamonds, where a fellow could make a little money if he were so inclined. M. replied "a man can make a little money here if he goes the right way about it." G. then by means of false statements, induced M., by promising to participate in the gold robberies, to admit that he had in his possession some gold scraped from the company's retorts. The statements were admitted to be false. The evidence was admitted

and the prisoner convicted. *Held*, by *Harding and Reel, JJ.*, that these representations being untrue, and being made after the subject matter of the charge had been taken, all subsequent material confessions of M. were inadmissible in evidence, as being adduced by such false statements, and that the conviction must be annulled. *Reg. v. Mangin*, 6 Q.L.J., 63 (1894). Q.

**8.—Forgery—Transfer of shares in company—Blank in document.]**—An indictment for forging and uttering a transfer of shares in a joint stock mining company is not supported by production of a blank transfer in the form given by the *Joint Stock Companies Act* 1860 (N.Z.), (24 Vic. No. 13), but not containing the name of the transferee, although in practice such documents had been usually taken and acted upon as transfers. *Reg. v. Smale*, 2 N.Z.C.A., 22. *Arney, C.J., Johnston, Gresson, Richmond and Chapman, JJ.* (1872). N.Z.

**9.—Larceny—Property in gold—Tributers.]**—When a gold mining company let part of their mine on tribute, stipulating that no specimens were to be removed without the consent of their inspector, and the course of business was that the gold was removed by a person authorised on behalf of the company to a bank, where it was assayed, and 15 per cent. of the proceeds of the crushing was to be reserved to the company, and the rest paid over to the tributers: *Held*, that no property in the gold itself passed out of the company to the tributers, and therefore that one of them who fraudulently took away portions of gold was rightly convicted of larceny thereof on counts laying the property in the company. *Reg. v. Hawkins*, 2 N.Z.C.A., 367. *Arney, C.J., Johnston, Gresson and Chapman, JJ.* (1874). N.Z.

**10.—Larceny—Purchase of an interest in a claim for mining—Deposit of purchase-money in Warden's Court on application for claim by vendor—Withdrawal of deposit by vendor without knowledge of purchaser—Property in purchase-money.]**—R. sold a half share in a special claim which he had marked out, and then, as agreed upon between him and the purchaser, an application for the holding was made by R. in his own name, and the purchase-money was deposited in the Warden's Court to cover the survey and other expenses which were incidental to the application. Shortly afterwards, before any survey expenses had been incurred, and

without acquainting the purchaser with his intention, R. applied to the Warden's Court for a refund of the deposit. This was returned to him, less the cost of advertising the application. R. then appropriated the money and left the colony. R. was charged with stealing the money on the day that he obtained the refund from the Warden's Court. *Held*, that the property in the money had passed to R., and therefore that the charge of larceny could not be sustained. *Reg. v. Rattray*, 15 N.Z.L.R., 259. *Conolly, J.* (1896). N.Z.

**11. — Mining Act 1874, sec. 129 — Forceibly taking possession—Warden's decision—Evidence—Justices—Prohibition.]**—See PRACTICE, 422.

**12.—Transfer of shares—Forgery—Registration—Estoppel.]**—See COMPANY, 254.

## CROWN

See ATTORNEY-GENERAL; CROWN LANDS; PRACTICE, LX.

**1.—Title to gold—Grant of land.]**—The title of the Sovereign to a gold mine in Crown lands in these colonies is considered to be on the same footing as the title to a gold mine in England, and not to be affected by a mere grant of the "land" *eo nomine*. *Woolley v. Ironstone Hill Co.*, 1 V.L.R. (E.), 237. *Molesworth, J.* (1875). Affirmed, *sub-nom. Woolley v. Attorney-General of Victoria*, 2 App. Cas., 163; 46 L.J.P.C., 18; 36 L.T., 121; 25 W.R., 852. *J.C., Lord Blackburn, Sir J. W. Colville, Sir Barnes Peacock, Sir Montague E. Smith and Sir R. P. Collier* (1877). V.

**2.—Gold escort—Crown not liable as common carrier.]**—See *Oriental Bank Corporation v. The Queen*, 8 N.S.W.S.C.R. (L.), 171. *Stephen, C.J., Cheeke and Faucett, JJ.* (1869). N.S.W.

**3.—Prerogative—Revenues to be derived from gold mines—Abandonment—Goldfields Act 1852 —7 & 8 Geo. IV. c. 29, sec. 37.]**—*Per Faucett, J.*, at p. 282:—"In the preamble to the *Goldfields Act* 1852, it is stated that all revenues to be derived from the gold mines and goldfields of the colony have been placed at the disposal of the Governor and Legislative Council for the public service of the colony. Now, I am not prepared to say that this is such an abandonment

as deprives the Crown of the title to the property in point of law. On the contrary, I think that the legal title and the legal ownership are still in the Crown. But it appears to me that the whole course of legislation in reference to the goldfields shows that the Act 7 & 8 Geo. IV. c. 29, sec. 37, if it were ever applicable, does not now apply to our goldfields." *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258. *Martin, C.J., Hargrave and Faucett, JJ.* (1874). N.S.W.

4.—Prerogative—Gold—Private lands—Goldfields legislation.]—By giving "the owners of private lands the power to authorise persons to mine on such lands for gold, and by confining the operation of the 'miner's right' to Crown lands, the Legislature, acting with the express previous sanction in that behalf of Her Majesty, as recited in the *Goldfields Act* 1852, clearly waived the Crown's right to the gold that might be found in private lands, and gave dominion over it to the owners of such lands."—*Per Martin, C.J.*, at p. 269. *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258. F.C. (1874).

N.S.W.

5.—Prerogative right to mines of gold and silver.]—Origin of, discussed by *Martin, C.J.*, in *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258, at pp. 269, 270. *Martin, C.J., Hargrave and Faucett, JJ.*

N.S.W.

6.—Possessory title against—21 Jac. I. c. 2—9 Geo. III. c. 16—Statutes of Limitation—Intrusion.]—The *Nullum Tempus Act* (9 Geo. III. c. 16), is in force in the colony. *Attorney-General v. Love*, 17 N.S.W.L.R. (L.), 16; 12 W.N., 93. *Darley, C.J., Windeyer and Stephen, JJ.* (1896).

N.S.W.

7.—Gold Mining Act 1885, secs. 5, 7—Miner's right—Mining license—Power of Warden.]—Her Majesty through her wardens of goldfields has absolute discretion as to the issue of miner's rights or licenses under the *Gold Mining Act* 1885. *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucaut and Bunday, JJ.* (1889).

S.A.

8.—Gold Mining Act 1885, secs. 5, 7—Miner's right—Power of Crown to restrain operation of.]—*Per Boucaut, J.*, at pp. 165, 166:—"The Act as framed says that, as against all the world, a miner's right shall operate all over the colony . . . [and] having taken such an exceedingly large grasp of that, it occurred to the

framers of the Act that there must be something left to the officers of the Crown, and they have left it by saying that the Crown, which gives the miner's right, shall not be touched by it. That is the effect of secs. 7 and 5. So a miner's right does not operate over the whole of the colony of South Australia, but only over such a part as the Government chooses. The *ipse dixit* of the Crown can be interposed at any moment and in any way it chooses. Consequently these miner's rights do not confer a title of right as against the Crown itself, because the holders are only entitled 'except as against Her Majesty.'" *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucaut and Bunday, JJ.* (1889). S.A.

9.—Grant of agricultural lease by Crown—Previously acquired easement.]—The saving of the rights of the Crown in the *N.Z. Goldfields Act* 1862 (26 Vic. No. 21), does not validate an agricultural lease issued by the Crown when it is inconsistent with an easement previously acquired under a miner's right. *Robinson v. Blundell, Mac.*, 683. *Chapman, J.* (1867-8).

N.Z.

10.—Auriferous deposits—Ownership.]—Auriferous deposits belong to the Crown subject to the goldfields law of the colony. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875). N.Z.

11.—Pollution of streams—Right of Crown.]—The Crown is not entitled for mining purposes to foul streams beyond goldfields to the detriment of the holders of land under Crown grants. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875).

N.Z.

12.—Petition of right—Minister of Works—Injunction.]—*See PRACTICE*, 192.

13.—Forfeiture—Evidencing intention—Lease—Goldfields Act 1866 (N.S.W.), (repealed)—Regulations.]—*See FORFEITURE*, 55.

14.—Reservation of land for public purposes—Water—Perpetuities—Nullum tempus, &c.].—*See WATER*.

15.—Crown—Possessory title against—Lost Crown grant.]—*See POSSESSION*.

16.—Writ of Intrusion—Nullum Tempus Act (9 Geo. III. c. 16)—Possessory title against the Crown.]—*See Attorney-General v. Milson*, 12

N.S.W.L.R. (L.), 121; 8 W.N., 5. *Darley, C.J., Windeyer and Foster, J.J.* (1891).

17.—Prerogative—Church and School Lands Municipal By-laws — Blasting.]—See MUNICIPALITIES.

18.—Writ of Intrusion—Pleading—No allegation of possession in defendant.]—See POSSESSION.

19.—Crown — Claims against — Discovery.]—See PRACTICE, 470.

20.—Crown—Possessory title against—Crown grant with reservations.]—See CROWN LANDS, 23.

## CROWN GRANT

See GRANT; LEASE.

## CROWN LANDS

See CLAIM; GRANT; LEASE; PARTNERSHIP; POSSESSION; PRACTICE, XXVIII., LX.; WARRANT.

1.]—*Semble*, that an Order in Council which affected a general exemption from mining operations of land of which a lease had been applied for, was not such an exemption as the Act No. 32 required. *Hookway v. Muirhead*, 1 W. & W. (L.), 107. Banco (1861). V.

2.—Attorney-General — Reservation — Public park.]—Application to restrain defendants from mining. The land, the subject matter of dispute, was, by an Order in Council of 1861, applied to a public use or purpose by being temporarily reserved as a public park. There was subsequent use for the purposes to which it had been applied by the proclamation. In such a case minute and specific allegations on the part of the applicant were held to be unnecessary. To constitute a public park, it is not necessary that it should be enclosed. *Attorney-General v. Southern Freehold Co. Regd.* (unreported), 27th July, 1868. V.

3.—Reservation.]—A proclamation made under the Act No. 117, temporarily reserving from sale certain Crown lands, was not an application of the land to a public use or purpose, within the meaning of the 4th section of the Act No. 32. *Attorney-General v. United Hand in Hand and Band of Hope G.M. Co. Regd.* (unreported), 27th July, 1868. V.

4.—Land Act 1869, sec. 93—Unauthorised occupation of Crown lands—Mining Statute 1865, sec. 5—Occupation under miner's right.]—A Crown lands bailiff summoned the defendant under sec. 93 of the *Land Act* 1869, for being in unauthorised occupation of Crown lands. For the defence it was proved that defendant was the holder of a miner's right, and that he had applied to the mining registrar of the Castle-maine Mining District for a certificate authorising him to use the land in question as a site for a dam, and had received a certificate of the application. It was argued that the certificate was not in accordance with the form given by the by-laws, and that as the defendant had not shown he was engaged in mining, the miner's right was no answer to the complaint. The magistrates dismissed the summons. *Held*, on appeal, that they were right, and that the complaint was sufficiently answered by showing an occupation under a miner's right. *McLean v. Wearn*, 1 A.J.R., 152. Banco (1870). V.

5.—Residence area — Miner's right — Mining Statute 1865, sec. 14—Unlawful occupation of Crown land—Personal demand.]—On the 14th April, 1869, M'Lean was the registered holder of a residence area under his miner's right. On the 20th August, 1869, certain land, including this area, was exempted from occupation under miner's rights by virtue of the *Mining Statute* 1865, sec. 14. Notwithstanding this notice, M'Lean continued to occupy. He was fined at the Police Court for unlawful occupation of Crown land, but he still continued to occupy. He was again summoned and again convicted. A rule for a prohibition against the second conviction was asked for on the grounds that having a miner's right he could not be said to be in unlawful occupation, and on the further ground that he was entitled to personal notice, he being at the least a tenant at will. *Held*, that *Wakeham v. Cobham*, 1 A.J.R. 93, governed this case, and that sec. 14 of the *Mining Statute* 1865 applied to persons in occupation at the time of the exemption. *Held*, further, that persons so in occupation are entitled to a personal demand of possession before they can be convicted for being in unauthorised occupation; but not in this case, as the fact of the defendant's having been previously summoned and convicted was a sufficient notice and demand. *Reg. v. Dowling, ex parte M'Lean*, 2 A.J.R., 56. Banco (1871). V.

6.—**Land Act 1869, sec. 94—Quartz tailings.**—The intention of sec. 94 of the *Land Act* 1869, was to prevent the searching for on, and removing from, Crown land that which has always been there *in situ*, and not that which by human means may have been deposited. Quartz tailings are not within the section. *Potter v. Wilkins*, 2 V.L.R. (L.), 47. Banco (1876). V.

7.—**Intrusion — Adverse possession against Crown**—21 Jac. I. c. 14—3 & 4 Wm. IV. c. 27, sec. 1—“Person.”—*Semble*, 21 Jac. I. c. 14, is not in force in N.S.W., but if it be, the Crown can, notwithstanding an intrusion on waste lands in the colony for twenty years, effectually grant such land without being put to its remedy by information of intrusion. Possession to oust the Crown must be adverse possession for sixty years. The word “person” in 3 & 4 Wm. IV. c. 27, sec. 1, does not include the Crown. *Doe d. Wilson v. Terry*, 2 N.S.W.S.C.R. (App.), 1. *Stephen, C.J.*, delivered the judgment of the Court (1849). N.S.W.

8.—**Crown lands — Grant of — Intrusion — Adverse possession—Mines.**—The waste lands of N.S.W. are, and ever have been from the time of its first settlement in 1788, in the Crown; and they are, and ever have been from that date, in point of legal intendment, without office found, in the Sovereign's possession, and as his or her property they have been, and may now be effectually granted to subjects of the Crown. At the time of making a grant of land to a subject, the Crown must be presumed to have had a title to that land; and its title, originally as the foundation and source of all other titles, is matter of judicial cognisance. A grant from the Crown contained the following clause:—“Provided nevertheless, and we do hereby reserve to ourselves all mines of gold and silver, and of coals, with full and free liberty and power to search for, dig, and take away the same.” *Held*, that veins of coal were excepted from the grant, and, as a corporeal hereditament remaining in the Crown, were properly the subject of an information of intrusion. *Held*, also, that there was nothing in the intrinsic operation of the above clause tending to a monopoly in the sale of coals. *Quere*, whether the Act 21 Jac. I. c. 14 extends to the colony. *Attorney-General v. Brown*, 2 N.S.W.S.C.R. (App.), 30. *Stephen, C.J.*, delivered the judgment of the Court (1847).

N.S.W.

9.—**Intrusion**—21 Jac. I. c. 14.]—In an information of intrusion for land, of which the defendant had been in possession more than twenty, but less than sixty years: *Held*, that the Crown was entitled to recover. The Act 21 Jac. I. c. 14 is not in force in the colony—(*Milford, J., diss.*). *Attorney-General v. Robinson*, 3 N.S.W.S.C.R. (L.), 23. *Stephen, C.J., Milford and Wise, JJ.* (1864). N.S.W.

10.—**Mineral conditional purchase—Alienation Act 1861, secs. 13, 18, 19—Sufficiency of description — Forfeiture.**—The plaintiff, with others, lodged an application for a mineral conditional purchase under sec. 19 of the *Alienation Act* of 1861 of lands described as follows:—“County of Bathurst, Parish of Bracebridge, forty acres, about one mile E. of road from Spring Vale to James Park, and about a mile in a S. direction from Markham and West's copper lease, to be taken as marked by applicants.” Certain land not in the parish mentioned, and to the north of M. and W.'s copper lease, was marked by the applicants, and was being worked by them at the time of the application. *Held (per Martin, C.J., and Manning, J., Hargrave J., diss.)*, that without the words “to be taken as marked” the description was void for uncertainty, but that with these words it was capable of being rendered certain, and that the judge was justified in leaving the question of identification to the jury. *Per Hargrave, J.*:—The description without the words referring to the marking was in sufficient compliance with the requirements of sec. 13. *Held*, also, that the words “to be taken as marked” controlled the inconsistent words of the description. After the plaintiff's application, a mineral lease of the same land was granted to the defendant, who ejected the plaintiff. Before the expiration of three years from the date of the application the plaintiff went to the office of the Minister of Lands, and was told by a clerk there that it was useless to tender the balance of the purchase-money. The plaintiff consequently did not pay it into the Treasury. In an action of ejectment brought by the plaintiff against the defendant, it was objected that the land had reverted to the Crown under sec. 18 upon the default of the plaintiff in payment of the balance. *Held*, that the plaintiff was entitled to maintain ejectment because:—(1.) *Per totam curiam*—The land does not revert under sec. 15 until the Crown has made a declara-

tion of forfeiture. (2.) *Per Martin, C.J., and Manning, J.*—The Crown had dispensed with the tender of the balance by wrongfully issuing a lease, and repudiating the plaintiff's title, and by the statement of the officer in the Lands Department that a tender would be useless. *Martin v. Baker, Knox, 418. Martin, C.J., Hargrave and Manning, JJ. (1877).* N.S.W.

11.—25 Vic. No. 1, sec. 19—39 Vic. No. 13, sec. 7—43 Vic. No. 29, sec. 10—Mineral selection—Application not tendered in person—Validity of selection—Waiver of Crown.]—An application for a mineral conditional purchase under sec. 19 of the *Alienation Act 1861* must be made in person; sec. 7 of the *Amendment Act 1875* applies to mineral selections, and an omission to comply with its provisions renders the application void. The requirements of sec. 7 are not conditions "annexed by law to the estate or interest of a conditional purchaser," within sec. 10 of the *Further Amendment Act 1880*, the breach of which is waived by receipt of the deposit money by the Crown. *Brown v. Patterson, 3 N.S.W. L.R. (L.), 368. Martin, C.J., Faucett and (?), JJ. (1882).* N.S.W.

12.—Alienation Act (25 Vic. No. 1), sec. 13—Mining Act (37 Vic. No. 13), secs. 40, 56—"Land under lease for mining purposes"—Lease applied for, but not granted.]—Plaintiff, in a proceeding under sec. 40 of the *Mining Act 1874*, had applied for a mineral lease under sec. 56 of that Act, and had paid one year's rent. While the plaintiff's application was pending, the defendant took up the land as a mining selection. *Held*, that at the time of the defendant's selection the land was not barred for selection by being "land under lease for mining purposes" within the meaning of sec. 13 of the *Alienation Act 1861*. These words do not apply to land for which an application for a lease has been made, but not granted. *Lyons v. Moore, 3 N.S.W. L.R. (L.), 379. Martin, C.J., Faucett and Windeyer, JJ. (1882).* N.S.W.

13.—25 Vic. No. 1, sec. 13—"Land under lease for mining purposes"—"Lease takes effect only from the time of its execution—Evidence of sealing—What constitutes a lease—37 Vic. No. 13, sec. 56, sub-sec. 5—Ejectment.]—Plaintiff's evidence of title was a conditional purchase made on 25th May, 1882. Defendant tendered in evidence a mineral lease of the land to him, dated 9th May, 1882, purporting to be executed by the Governor

and having on it a circular impressed mark or stamp, with the letters "DE" or "DEI" in the margin. The judge at the trial having rejected this evidence on the ground that it was not proved that the lease had been executed by the Governor, or that it bore the great seal of the colony, defendant called a witness who proved the execution of the lease by the Governor, but who stated on cross-examination that the lease was not executed until on or after 2nd June, 1882. The lease was then admitted in evidence. On motion for a rule nisi for a new trial on the grounds (*inter alia*)—(1.) That the mineral lease to the defendant took effect from the date which it bore. (2.) That the judge wrongly rejected the lease when tendered in evidence: *Held*—(1.) that the lease, as a lease, could take effect only from the time of its execution. (2.) That even supposing the judge took a wrong course in rejecting the lease, still, as the document was afterwards put in evidence, a new trial would not be granted on the second ground. The rule was refused on these two grounds, but granted on another. *King v. M'Ivor, 4 N.S.W. L.R. (L.), 43. Martin, C.J., Windeyer and Innes, JJ. (1882-3).* And see S.C., LEASE. N.S.W.

14.—Selection under sec. 19 of the Alienation Act 1861, of land in goldfield—25 Vic. No. 1, secs. 13, 14, 19—37 Vic. No. 13, secs. 27, 28—Special case—Ejectment.]—Plaintiff took up the land in question as a mineral conditional purchase under sec. 19 of the *Alienation Act 1861*. Defendant was an applicant under the *Mining Act* for a lease of the same land. *Held*, that the plaintiff's selection was bad. The words "Crown lands" in sec. 19 have the same meaning as those words in sec. 13, qualified as they are by the subsequent words of the section. Therefore, Crown lands within a proclaimed goldfield cannot be taken up as a mineral conditional purchase under sec. 19. Judgment for the defendant. *Wood v. Scott, 6 N.S.W. L.R. (L.), 83. Faucett, Windeyer and Innes, JJ. (1885).* N.S.W.

15.—Reserve "pending selection of railway line and other public purposes"—Description of area reserved—Population area.]—Ejectment to recover possession of two measured portions, to which the plaintiff's title was a mineral conditional purchase made by him on 17th July, 1884. The defence, as to both portions, was that the selections were in a reserve from sale of



2nd January, 1874, "pending selection of railway line and other public purposes," made under sec. 4 of the *Crown Lands Alienation Act* 1861. The area reserved was described as "The Crown lands within the watershed of Port Hacking Creek and Port Hacking, from its source downwards to the sea." A further defence as to one of the portions was that the land was within two miles of the village of Clifton, being a village containing 100 inhabitants according to the last census, within the meaning of sec. 13 of the *Crown Lands Alienation Act* 1861. Verdict for defendant. *Held*, that the purpose for which the reserve was notified, was a purpose which came within the meaning of sec. 4 of the *Crown Lands Alienation Act*. *Held* also, that the description of the area reserved was sufficient, there being a statement of facts from which the metes and bounds of the proposed reserve could be easily ascertained. *Held*, further, that one portion was proved to be within the population areas as defined by sec. 13 of the *Crown Lands Alienation Act* 1861. It is not necessary that a village in contemplation of that section must be one recognised and laid out by the Government. The proper mode of proving the population was to put in evidence the return made to Parliament in pursuance of sec. 11 of the *Census Act*, and the evidence showed that the word "Clifton" meant the village of Clifton. Rule for a new trial refused. *Brown v. Walker*, 6 N.S.W.L.R. (L.), 160; 2 W.N., 1. *Martin, C.J., Windeyer and Innes, JJ.* (1885). N.S.W.

16.—Selection of measured portion partly on reserve—Proof that at time of selection land was Crown land — Partial rescission of reserve — Evidence that land was a measured portion.]—Where a (mineral) conditional purchase is made of a measured portion, part of which is within a reserve, the conditional purchase is bad. *Quære*, whether it is necessary for a person claiming under a conditional purchase to show that the land at the time of selection was Crown lands. Circumstances considered, which will amount to *prima facie* evidence of this fact. The Crown has power to make a partial rescission of a reserve. What evidence considered sufficient to show that land selected was a measured portion. *Heinz v. Walker*, 6 N.S.W.L.R. (L.), 166; 2 W.N., 2. *Martin, C.J., Windeyer and Innes, JJ.* (1885). N.S.W.

17.—48 Vic. No. 18, secs. 4, 86, 88, 90—Mean-

ing of "Crown lands"—Interpretation clause.]—The words "Crown lands" in sec. 80 of the *Crown Lands Act* 1884 do not include lands held under a pastoral lease. In sec. 4, "context" means not the part which immediately precedes or follows a section, but the whole Act. *Semble*, "Crown lands" in sec. 86 do not mean Crown lands as defined in sec. 4 of the Act. *Per Foster, J. (arg.)*, at p. 132:—"A lease to mine land would not be inconsistent with a lease to graze over the same land." *Jaques v. Stafford*, 11 N.S.W.L.R. (L.), 127. *Darley, C.J., Stephen and Foster, JJ.* (1890). N.S.W.

18.—48 Vic. No. 18, sec. 45—Regulations 251 and 252 — Proclaimed goldfield — Trespass.]—*Held (per Windeyer and Innes, JJ., Stephen, J., dubitante)*, that the holder of a permit under sec. 45 of the *Crown Lands Act* 1884, to dig and search for gold on land which was within a proclaimed goldfield, who had entered into possession of the land in accordance with the Act and regulations, was entitled to maintain an action of trespass in respect of such land. *Ferrier v. Smith*, 13 N.S.W.L.R. (L.), 146; 8 W.N., 141 (1892). N.S.W.

19.—48 Vic. No. 18, sec. 45—Proclaimed goldfield—Trespass—Holder of permit.]—*Per Windeyer, J.*, at pp. 148-9:—"It appears to me, looking at the provisions contained in sec. 45, and Regulations 251 and 252, that it was the intention of the Legislature to give to the holder of a permit the right to occupy and hold possession of the prospecting protection area as against everyone else. This position is, in fact, very similar to that of a conditional purchaser on Crown lands held under an occupation license. Just as the conditional purchaser of such land has the right, if he complies with the law, not only to take possession of it, but to hold it against the original licensee, so the holder of a permit is entitled to possession of the land against the conditional purchaser. If the land prove to be auriferous, the land becomes 'Crown land,' and the conditional purchaser is absolutely deprived of it. Whatever hardship or inconvenience there may be, it seems to me to have been the intention of the Legislature that the permit holder should enjoy the land in such a way as to enable him to dig and search for gold, and it is obvious that he cannot do this if his right is to be disputed either by the conditional purchaser or some person claiming the land under him."



*Ferrier v. Smith*, 13 N.S.W.L.R. (L.), 146; 8 W.N., 141 (1892). N.S.W.

20.—Commons—Common dedicated before the passing of 18 & 19 Vic., c. 54 (Imperial Act assenting to Constitution Act)—Revocation—48 Vic. No. 18, sec. 105.]—The power of revocation contained in sec. 105 of the *Crown Lands Act* 1884 (48 Vic. No. 18), is not limited to lands which were waste lands at the time of the passing of 18 & 19 Vic. c. 54. *Ex parte Phipps*, 13 N.S.W.L.R. (L.), 171; 9 W.N., 20. *Darley, C.J., Windeyer and Innes, JJ.* (1892). N.S.W.

21.—Justices—Prohibition—Title to land in dispute—48 Vic. No. 18, sec. 133.]—C. was prosecuted before justices under sec. 133 of *Crown Lands Act* 1884, as being a person found occupying Crown land and not lawfully claiming the land under some subsisting lease or license, &c., or under some Act for the regulation of mining, and set up the defence that the land was not Crown land. *Held*, that as the question whether the land was Crown land or not was *bond fide* in dispute, the jurisdiction of the justices was ousted. *Ex parte Coffill*, 15 N.S.W.L.R. (L.), 191; 10 W.N., 222. *Innes, Stephen and Foster, JJ.* (1894). N.S.W.

22.—Crown Lands Act 1889, sec. 46—Exchange of land by pastoral leaseholder—Concluded contract—Assent of the Governor-in-Council—Mining Act (37 Vic. No. 13), sec. 13—Suspension of pastoral lease—Compensation for improvements—Equity Act 1880, secs. 4, 57—Right to relief in Equity—Injunction to recover leasehold.]—A pastoral leaseholder applied under sec. 46 of the *Crown Lands Act* 1889 for an exchange of freehold land for land within the leasehold area. The application was referred to the Land Board for report, and was then approved by the Minister. The application was not submitted for the approval of the Governor-in-Council. *Held*, that the applicant was not bound by the Minister's approval, but was at liberty to withdraw his application. If the Crown suspends a lease or part of a lease of improved lands under sec. 13 of the *Mining Act*, it must not only abate the rent, but must also pay compensation for improvements. A tenant is entitled to an injunction in the Equity Court to restrain his landlord from continuing a breach of his covenant for quiet enjoyment in the lease. *Ricketson v. Smith*, 16 N.S.W.L.R. (E.), 221. *Owen, J.* (1895). N.S.W.

23.—Writ of Intrusion—9 Geo. III. c. 16—Possession adverse to the Crown—Evidence—Crown grant with reservations.]—*See Attorney-General v. Milson*, 16 N.S.W.L.R. (L.), 145 (1895). J.C., *Lords Watson, Macnaghten, Shand and Davey*, affirming S.C., 12 N.S.W.L.R. (L.), 121. N.S.W.

24.—Unauthorised possession of Crown Lands—Remedy—Information—Writ of intrusion.]—The only and proper remedy for intrusion on or unauthorised possession of Crown lands in the colonies is by information in Chancery or Writ of Intrusion. The holder of a miner's writ cannot bring an action to have the interest of the person in possession declared void. *Reg. v. Hughes*, L.R. 1 P.C., 51 (*see LEASE*), followed. *Osborne v. Morgan; Martin v. Morgan*, 2 Q.L.J., 113. *Harding and Mein, JJ.* (1886). Q.

25.—Crown Lands Consolidation Act 1877—Married woman—Title—Gravel—Damages.]—A., a purchaser on credit of certain land from the Government under the *Crown Lands Consolidation Act* 1877, married B., but did not transfer to him, or to any other person, the land in question, nor did it appear whether B. was qualified to hold the same. C., a contractor under Government, and by his contract authorised to remove gravel from Crown lands, entered on the land, constructed a tramway and gravel pit, at an expense of £300, and removed gravel to the extent of 14,515 yards. The gravel at the pit's mouth was valued at one shilling per yard. The tramway was constructed before the defendant had notice of the plaintiff's title, but the gravel was removed after such notice. The agent of A. and B., the plaintiffs, had shortly before the removal of the gravel, offered to sell their interest as selectors of the whole of the land for £250. On action by A. and B. for trespass, removal of gravel, and injury to trees and land, the jury found a verdict for £825 15s., one item of which was made up of 14,515 yards of gravel at one shilling per yard—the value at the pit's mouth—no allowance being made for the expense of constructing the tramway and gravel pit which were necessary to render the gravel available. *Held*—(1.) That the plaintiffs had sufficient title to enable them to recover. (2.) That there must be a new trial, unless the plaintiffs consented to reduce the damages by £300, the cost of the tramway and gravel pit. *McCarthy v. Brooks*, 14 S.A.L.R., 133. *Way*,

*C.J., Gwynne and Boucaut, JJ.* Common Law. (1880). S.A.

26.—Crown lands—Entry on for marking boundaries of mineral lease.]—*See* LEASE, 51, 52.

27.—Reclamation of water frontage—Promise of a grant—Right of access to water.]—*See* WATER.

28.—Crown Lands Act 1884 (N.S.W.)—Mining Act—Temporary reserve.]—*See* LEASE, 56.

29.—Lease—Trespass—Royal mine—Q. Gold-fields Act 1874, secs. 2, 10, 14.]—*See* LEASE, 69.

30.—Crown lands (S.A.)—*See* LEASE, 70, 71.

31.—Waste lands of the Crown.]—*See* LEASE, 74.

32.—Waste Lands Act 1867 (S.A.)—Regulations of the Waste Lands Act 1868—Surrender of pastoral lease—New lease—Public maps—Boundary.]—*See* MAP.

33.—Crown lands—Easement in.]—*See* EASEMENT.

## CROWN LEASE

*See* CROWN LANDS; LEASE.

## CROWN RIGHTS AND LIABILITIES

*See* CROWN.

## CUSTOM

Quartz crushing machine—Gold attaching to amalgam plates—Property—Proof of custom—Reasonableness.]—*See* GOLD, 4.

## DAM

*See* WATER.

## DAMAGES

*See* CLAIM, 7; PRACTICE, 29, 52, 183, 404; TRESPASS.

1.—Encroachment—Act No. 32, sec. 76.]—In a complaint for encroachment before the Warden, under sec. 76 of the Act No. 32, where it appeared that several of the shareholders had not miners' rights at the time of the encroachment: *Held*, that the Warden or Court should have ascertained the damages generally, and out of them awarded an amount in proportion to the number of shares held by shareholders entitled to institute proceedings by virtue of miners' rights. *Critchley v. Graham*, 2 W. & W. (L.), 71. Banco (1863). V.

2.—Apportionment—Joint trespass—Miners' rights.—Where it appeared that some of the complainants, in such a complaint had not miner's rights during the whole, but during a part only of the time: *Held*, that the Warden or Court ought to divide the time and give damages accordingly. *Ibid*. V.

2a.]—When in such a complaint against trespassers the Warden finds a joint trespass against all, and awards damages against all, and upon appeal by all such defendants to the Court of Mines it appears that some only of the defendants participated in the trespass, the Court may and ought to reverse the decision in part, and affirm in part. *Ibid*. V.

3.]—If, in a complaint for trespass, all the complainants have not miners' rights, the damages ought to be apportioned, and an apportionment recovered only by those who held miners' rights at the time the cause of action arose. *Ibid*. V.

4.—Damage to tramway—Police Offences Statute, sec. 17, sub-sec. 7—Joint damage—Apportionment—Offence.]—S. was summoned under the *Police Offences Statute* (No. 357), sec. 17, for having damaged a tramway belonging to P. £15 were claimed as damages. The magistrate convicted, and ordered defendant to pay a fine of £2 10s., with £5 damages and costs. It was proved that the defendant had, with four others, destroyed the tramway in question. The total damages to the tramway were estimated at £62. The five persons implicated, of whom S. was one, were each separately summoned for £15 damages. It was contended on behalf of S. that as the damage done amounted to £62, the magistrate had no jurisdiction under the Statute, as by it the jurisdiction was limited to cases of damage under £20; and as the injury done was

over £80 and was jointly committed, it was impossible to apportion the damages between the five who had committed it. *Held*, that the objection was fatal and that the conviction could not be sustained. *Smith v. Perkins*, 1 A.J.R., 28. Banco (1870). V.

5.—Contract for delivery of ore for smelting purposes — Breach of contract — Measure of damages—Profits of smelter.]—In an action by a smelting company against a mining company for damages for non-delivery of weekly instalments of ore pursuant to a contract, the measure of damages is not the difference between the contract and the market price of the ore not delivered, but the loss actually sustained, it appearing that the contract was one by which machinery and skilled labour were to be applied by the plaintiffs to the treatment of ore of a certain character, to be paid for at a price fixed by reference to the value of its estimated products when treated, and the expected profitable use of the plaintiffs' machinery and labour being the inducement to contract, and it being also uncertain whether the plaintiffs could have obtained in the market ore of the grade or grades required, in any specified quantity at any particular time. *Australian Smelting Co. Ltd. v. British Broken Hill Proprietary Co. Ltd.*, 22 V.L.R., 190; 18 A.L.T., 64; 2 A.L.R., 173. F.C., *Holroyd and a'Beckett, JJ.* (*Hood, J., diss.*), reversing *Hodges, J.* (1895-6). V.

6. — Water — Deprivation of — Damages.] — Where a person is unlawfully deprived of the use of his property, the measure of damages is not the amount for which the use of the property might have been obtained voluntarily from the owner had he desired to lease it. In such a case the Court will not be too nice in weighing the damages. *Leary v. United Hercules Hydraulic Sluicing Co.* (No. 2), 10 N.Z.L.R., 420. *Williams, J.* (1890). N.Z.

7.—Damages — Measure of — Contract — Auriferous sand.]—See CONTRACT, 2.

8.—Gold removed — Accidental encroachment — Cost of extracting gold.]—See TRESPASS.

9.—Rectification of register—Companies Act (N.S.W.), sec. 33.]—See COMPANY, 159.

10.—Equity Act (N.S.W.), sec. 32—Contract.] —See SPECIFIC PERFORMANCE.

11.—Action against directors for misrepresentations in prospectus — Assessment.] — See *De Kantzon v. Inglis*, 10 N.S.W.L.R. (L.), 297; 6 W.N., 110. Banco (1889). N.S.W.

12.—Injury to water-course—Question for jury.] —See WATER.

13.—For refusal to register transfer of shares.] —See COMPANY, 245.

14.—Trespass — Gravel, removal of — Crown lands — Married woman — Title.] — See CROWN LANDS, 25.

15.—Action for pollution of stream—Damages — Measure of.]—See WATER.

16.—Trespass to land—Cattle—Damages.]— See TRESPASS.

17. — Mine — Trespass by adjoining owner — Measure of damages—Fraudulent entry.]—See TRESPASS.

## DEBENTURES

See COMPANY, III., 404, 405a.

## DECLARATORY ORDER

See PRACTICE, XIV.

## DECREE

See COMPANY, 49, 186, 187; CONTRACT; FORTFEITURE; PRACTICE, 1, 58, 61, 75, 102, 140, 339.

## DEDICATION

See ROAD.

Common — Revocation.] — See CROWN LANDS, 20.

## DEED

Deed of settlement—Unlimited company afterwards becoming limited—Supplemental deed—Rights of debenture holders—"Property."]—See COMPANY, 32.

**DEFAULT**

Default in application for lease.]-See LEASE, 42.

**DELAY**

See COMPANY, 341, 342.

Delay in registration.]-See REGISTRATION.

**DETINUE**

See COMPANY, 59.

**DIRECTORS**

See COMPANY, V.

**DISCOVERY**

Discovery of gold—Reward claim—Measurement of distance—Goldfields Act 1874 (Q.), (38 Vic. No. 11), Regulations 6, 9, 44.]-See CLAIM, 29.

**DISCRETION**

Discretion of Warden—Appeal.]-See PRACTICE, 411.

**DISMISSAL**

See PRACTICE, 21 ; PARTNERSHIP.

**DISSOLUTION**

See COMPANY ; PARTNERSHIP.

**DISTANCE**

Goldfields Act 1874 (Q.), (38 Vic. No. 11), Regulation 44 — Measurement of distance.]-See CLAIM, 29.

**DISTRESS**

See MACHINERY.

1.—Payment of money into Court—Jurisdiction to determine rights of parties where liquidator's appointment invalid.]-Where, on summons by a liquidator whose appointment was invalid, an order by consent was made that goods, the property of a gold mining company incorporated under the N.Z. Companies Act 1882 seized for rent of a special claim, be returned "on payment of money into Court to abide the order of the Court in lieu of the goods, each party reserving all rights as if the money had not been paid into Court," and the goods are returned accordingly, and sold, the Court, on application by a liquidator, duly appointed, that the money be paid out to him, will determine the rights of parties to the money as it would have done their rights to the goods in an action of replevin. *In re Talisman Dredging Co.*, 11 N.Z.L.R., 69. *Williams, J.* (1892). N.Z.

2.—Claim—What goods may be seized.]-Under a warrant of distress for rent of a claim, the goods of the legal owner alone can be seized, and where the distress is made by the Warden under the provisions of the N.Z. Mining Acts and Regulations, he cannot rely upon common law rights of distress possessed by the Crown. *In re Talisman Dredging Co.*, 11 N.Z.L.R., 69. *Williams, J.* (1892). N.Z.

3.—Special claim—Right to distress.]-See SPECIAL CLAIM.

**DISTRICT COURT**

See PRACTICE, XVIII.

**DIVIDEND**

See COMPANY, 60 ; 201.

**DRAINAGE**

Order for contribution—Drainage of Mines Act 1877 (No. 596), sec. 3.]-It is not imperative on the Warden, making an order for contribution

under the *Drainage of Mines Act 1877* (No. 596), to impose on the owners of the machinery terms for its efficient working. Contribution under the *Drainage of Mines Act 1877* (No. 596), sec. 3, may be recovered, although the machinery used for drainage purposes is also used for other mining purposes. *Wheat Terrill Q.M. Co. v. Irwin (Central Wattle Gully Co.)*, 6 V.L.R. (M.), 11; 1 A.L.T., 176. *Molesworth, J.* (1890). V.

## EASEMENT

See LATERAL SUPPORT.

1.—**Easement over Crown lands.**—The holder of a miner's right and of a license to construct a water-race may acquire, under the *Goldfields Act* (N.Z.), an easement over Crown lands. *Robinson v. Blundell, Mac.*, 683. *Chapman, J.* (1867-8).

2.—**Agreement for use of road over residence area—License not easement.**—See LICENSE, 5.

3.—**Grant of agricultural lease by Crown—Previously acquired easement.**—See LEASE, 75.

4.—**Water-race—Extinguishment of right in.**—See WATER.

## EJECTMENT

See MINER'S RIGHT.

## ELECTION

*Regulation of Local Elections Act 1876* (N.Z.), (40 Vic. No. 1), sec. 52.—**Election petition—Elector—Miner's right.**—Although at an election of a member of a county council, under the *Regulation of Local Elections Act 1876* (N.Z.), (40 Vic. No. 1), an elector holding a miner's right qualification cannot vote unless he is resident in the riding in which the election is held, yet if his name be on the roll he is still an elector, and can therefore sign a petition against the election. *Wilson v. Stratford*, N.Z.L.R., 3 S.C., 329. *Johnston, J.* (1885). N.Z.

## EMPLOYER AND EMPLOYEE

See NEGLIGENCE; TRIBUTE.

1.—**Regulation of Mines Statute 1873** (No. 480), secs. 5, 8.—**Accident—"Fellow servant"—Burden of proof.**—The doctrine that a master is not responsible to one workman for the act of another in the course of their common employment has been abrogated by the *Miners' Regulation Act* (No. 480), so far as workmen employed in mines are concerned. *Quære*, whether contributory negligence will defeat the action? *Quære* also, as to the effect of the Act when criminal proceedings are taken to recover a penalty against the owner for the neglect of the manager. The accident is all that need be proved by the plaintiff and then the burden of proof is by the Act thrown on the defendant. *Kaye v. Ironstone Hill Lead G.M. Co.*, 2 V.L.R. (L.), 148. *Banco* (1876). V.

2.—**Regulation of Mines and Machinery Act 1883** (No. 783), sec. 5.—**Employing miner below ground more than eight hours a day—Half-hour for refreshment.**—Where miners are allowed half-an-hour for refreshment during their shift, which time is entirely at their own disposal, their employer is not liable to a penalty for keeping them eight hours and a half below ground. *Granger v. St. Mungo G.M. Co.*, 12 V.L.R., 5; 7 A.L.T., 107. F.C., *Williams, Holroyd and Cope, JJ.* (1886). V.

3.—**Selection of workman—Onus of proof as to due care in.**—The burden of proving that a workman has been selected with due care lies on the party asserting the fact. *O'Driscoll v. North Duke Co.*, 17 A.L.T., 64; 1 A.L.R., 94. *Holroyd, J.* (1895). V.

4.—**20 Vic. No. 28 — Agreements Validating Act (39 Vic. No. 29)—Corporation—Coal miner.**—A corporation may be a master within the meaning of the *Masters and Servants Act* (20 Vic. No. 28), and, as such, is amenable to such provisions of the Act as are applicable to corporations. The word "person" may, in the same Act of Parliament, in one clause include a corporation, while in another clause it may not include a corporation. A coal miner is a servant within the meaning of the *Masters and Servants Act*. Where, in appending a certificate under the *Agreements Validating Act* the person signing did not "add name of office, &c.," as required

by the schedule of the Act: *Held*, that as it appeared in the body of the certificate that the person was duly authorised to grant certificates, the certificate sufficiently complied with the form and effect of the schedule. *Held*, also, that the agreement having been re-executed in the colony under sec. 5 of the Act, did not depend upon the Act for its validity. *Ex parte Sperring*, 11 N.S.W.L.R. (L.), 407; 7 W.N., 89. *Darley, C.J., Windeyer and Foster, JJ.* (1890). N.S.W.

5.—Employers Liability Act 1886 (50 Vic. No. 8), secs. 4, 7.—Practice—Notice of injury—Leave to proceed notwithstanding no notice.]—A judge in Chambers has no power *after* action brought to give the plaintiff, in an action under the *Employers Liability Act* 1886, leave to proceed with the action where no notice of the injury has been given. Sec. 4 only empowers the judge to give a plaintiff leave to bring the action. Notice of the injury, to be a notice within the meaning of the Act, must be a written notice, and must be given before action brought, and therefore the issue of the writ is not a notice. *Thompson v. Southern Coal Co. of N.S.W. Ltd.* (No. 1), 15 N.S.W.L.R. (L.), 162; 10 W.N., 181. *Darley, C.J., Windeyer and Stephen, JJ.* (1894). N.S.W.

6.—Employers Liability Act 1886 (50 Vic. No. 8)—Practice—Notice of injury—Leave to proceed.]—An application for leave to proceed with an action under the *Employers Liability Act*, notwithstanding that no notice of the injury had been given, having been refused, the plaintiff applied to the Court for leave to proceed, alleging that notice had been given, but not duly. *Held*, that the plaintiff having failed on the first application, was not entitled to make the second. When an application is made to the Court, and that application is refused, a second application of the very same nature cannot be made to the Court. In an action under the *Employers Liability Act*, the plaintiff applied for leave to proceed with the action, notwithstanding that notice of the injury had not been duly given. This application was not made until fifteen months after the accident, and a year after the plaintiff was in a position to make the application. The Court refused the application on the ground that the plaintiff was too late in making the application. *Thompson v. Southern Coal Co. of N.S.W. Ltd.* (No. 2), 15 N.S.W.L.R.

(L.), 166; 10 W.N., 214. *Darley, C.J., Innes and Stephen, JJ.* (1894). N.S.W.

7.—Negligence—Coal mining—Defect in system—Injury to workman through blasting in another portion of mine—Risk voluntarily incurred—*Volenti non fit injuria*—Pleading—39 Vic. No. 31, sec. 12, sub-sec. 19.]—The plaintiff, a miner, whilst working in a bord in the defendant's mine, was injured through a blast fired in another bord, the wall between the two bords being too thin to resist the operation of blasting, and brought an action against the defendants to recover damages for the injuries sustained. In the declaration he did not allege that he was ignorant of the state of the wall between the two bords. *Held*, on demurrer that the declaration was good, as the maxim *volenti non fit injuria* did not apply, the operation which caused the accident being one entirely independent of the plaintiff and the work in which he was engaged. In an action by an employé against his employer to recover damages for injuries sustained through the breach of a statutory duty, the defence arising from the maxim *volenti non fit injuria* is not applicable. *Donaldson v. Stockton Coal Co.*, 16 N.S.W.L.R. (L.), 69; 11 W.N., 133. *Darley, C.J., Windeyer and Innes, JJ.* (1894-5). N.S.W.

7a.—Employee and contractor—Liability of employer for negligence of contractor—Work not dangerous in itself.]—The defendants, who were owners of a gold mine, contracted with M. to do all the stoping; and with C. to truck and haul the ore. A servant of C., in the course of his work as a trucker, was guilty of negligence, in consequence of which the plaintiff, a servant of M., was injured. *Held*, that the work, not being dangerous in itself, the defendants were not liable for the negligence of C. or his servants. *Martin v. Sunlight G.M. Co.*, 17 N.S.W.L.R. (L.), 364; 13 N.S.W.W.N., 85. F.C., *Darley, C.J., Stephen and Manning, JJ.* (1896). N.S.W.

8.—Action for damages—Breach of statutory duty by both employer and employee—Mines Regulation Act (Q.), 1881 (45 Vic. No. 6), secs. 6, 11, 14, 17.]—Plaintiff was employed by defendants in mining in their gold mine, and was provided by them, in contravention of sec. 6 of the *Mines Regulation Act* 1881 (45 Vic. No. 6), with an iron tamping rod. Though he knew it to be dangerous to use an iron rod, he continued to use it, and was

blown up by an explosion while ramming a charge of powder. By sec. 14, every person employed in a mine is directed to cease using any appliances which he finds to be unsafe, otherwise, by sec. 17, he is guilty of an offence under the Act. *Held*, that plaintiff was guilty of a breach of the statutory duty equally with the defendants, and that he was an offender against the Statute, and that his injury being consequent upon his own disobedience of the law, he could not compensate himself for his own injury by recovering damages from his employers, the defendants. *Baddeley v. Earl Granville*, 19 Q.B.D., 423, distinguished. *Shanahan v. Taranganba Proprietary G.M. Co. Ltd.*, 3 Q.L.J., 147. *Lilley, C.J.* (1889). Q.

9.—Employer and employee—Master and Servants Act 1863, sec. 16—Agent—Contract—Injunction—Winding up.]—An injunction will be granted to restrain proceedings under sec. 16 of the *Masters and Servants Act* 1863, against the secretary of a company in course of voluntary liquidation, on a contract entered into by him for the company. *Quære*, whether the secretary of a company, or the agent of an individual, is not personally liable, under the above Act, for wages due pursuant to a contract signed by such secretary for his company, or by such agent for his principal, though the contract be made in the name of such company, or principal. *In re Sliding Rock Mining and Smelting Co., ex parte Nicole*, 11 S.A.L.R., 35. *Stow, J.* Equity (1877). S.A.

10.—Employer and employee—Weekly hiring General hiring — Determination of service — Reasonable notice—Winding up of company.]—The plaintiff was engaged by the defendant company at a weekly salary as manager of a mine in the MacDonnell Ranges, five weeks' journey from Adelaide. On 9th April, 1889, the company gave plaintiff a week's notice determining the service, but the company made no provision for relieving him of the custody and care of their camels and other property, of which the plaintiff remained in charge after the expiration of the notice. On April 10th, a resolution was passed to wind up the company. The plaintiff then claimed wages to 20th August, 1889, in lieu of notice. *Held*, that the presumption of a weekly hiring raised by the reservation of a weekly salary was rebutted by the other circumstances of the service. The plaintiff was accordingly entitled to reasonable notice, and under the circum-

stances his claim for payment up to August 20th was a reasonable one. *Seem*, a resolution to wind up the company did not determine the contract of service. *Wild v. Great Matrix Ruby M. Co.*, 24 S.A.L.R., 48. F.C., *Way, C.J.*, *Boucaut and Bunday, JJ.* (1890). S.A.

11.—Employer and employee—Contract—Terms in writing—Acceptance implied from contract —Dismissal of mining engineer—Pleading.]—See CONTRACT, 7.

12.—Employer and employee—Coal Mines Regulation—Appointment of check-weigher.]—See COAL.

13.—"Person employed"—Meaning of.]—See WORDS.

## ENCROACHMENT

See TRESPASS.

## ENLARGING SUMMONS

See PRACTICE, 347.

## ENTRY

See LEASE.

## ERROR

Notice to owner of private property of application to mine—Error in notice.]—See PRIVATE PROPERTY.

## ESCORT

Loss of gold while under — Government not liable as common carrier.]—See *Oriental Bank Corporation v. The Queen*, 8 N.S.W.S.C.R. (L.), 171. *Stephen, C.J.*, *Cheeke and Faucett, JJ.* (1869). N.S.W.

## ESTOPPEL

See ABANDONMENT; COMPANY, 2, 64, 78, 155, 236, 254, 255, 386; LEASE; PRACTICE, 181.

1.—Acquiescence.]—Where owners of property suspect that it is being encroached upon, they are right in waiting till they can fix definitely the responsibility on the persons encroaching, or their employers, before they take legal proceedings; such acquiescence would not disentitle the parties to relief. *Lane v. Hannah*, 1 W. & W. (E.), 66. *Molesworth, J.* (1861). V.

2.—Decision of Warden—Nonsuit.]—When a complaint for trespass is dismissed by the Warden as by way of nonsuit, the complainant having failed to make out his case, and no question of title having been decided, the complainant is not estopped from proceeding in the Supreme Court, although he has not appealed to the Court of Mines from such decision. *Aladdin G.M. Co. Regd. v. Aladdin and Try Again United G.M. Co. Regd.*, 6 W.W. & A'B. (E.), 278. *Molesworth, J.* (1869). V.

3.—Estoppel—Trespass.]—Where A., acting by direction of B., commits a trespass on land, and unsuccessfully defends an action by the owner in respect thereof, the judgment is no estoppel of B., but is strong evidence against him. *Park Co. v. South Husler's Reserve Co.*, 9 V.L.R. (M.), 4; 4 A.L.T., 135. *Molesworth, J.* (1883). V.

4.—Acquiescence.]—Mere quiescence may not be acquiescence, and the doctrine of acquiescence in injurious acts does not apply to acts done on lands not belonging to the party said to have acquiesced. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875). N.Z.

5.—Director of company—Invalid incorporation—Estoppel.]—See COMPANY, 78.

6.—Sale of shares—Broker—Misrepresentation—Ratification.]—See COMPANY, 236.

7.—Specific performance—Secret commission—Admissibility of evidence to vary written agreement.]—See SPECIFIC PERFORMANCE.

8.—Company—Special resolution—Meeting—Conditional notice—Notice duly given—Articles of association.]—See COMPANY, 2.

9.—Acquiescence in order afterwards impeached—Estoppel.]—See PRACTICE, 234.

10.—Pollution of stream—Acquiescence.]—See WATER.

## EVIDENCE

See ABANDONMENT; CLAIM; COMPANY; LEASE; LICENSE; MINER'S RIGHT; PRACTICE, 48, 54, 56, 184, 329, 402; ROAD.

1.—Mining Registrar's books—Miners' rights.]—The production of the Mining Registrar's books would be evidence to show the existence of miners' rights in the persons taking up a claim, as their qualification for taking it up; but not for the collateral purpose of showing that parties, plaintiffs, had miners' rights at the time of the injury complained of under Act No. 291, sec. 246. *Cruise v. Crowley*, 5 W.W. & A'B. (M.), 28. *Molesworth, J.* (1868). See Act No. 291, sec. 49. V.

2.—Mining Statute 1865, secs. 203, 221, schedule 26—Injunction granted by Warden on affidavits only—Wrongly entitling documents—Surplusage—Discharge from custody.]—C. having been imprisoned under a Warden's warrant for contempt of an injunction order made by the Warden, applied to the Chief Judge, under sec. 221 of the Mining Statute 1865, to be discharged from custody, on the ground that the injunction order was bad, inasmuch as affidavits only were used on the occasion of its being granted. *Held*, that sec. 203, coupled with the 26th schedule of Act No. 291, enabled the Warden to grant the injunction on affidavits only. Wrongly entitling documents "in the Warden's Court" does not invalidate them; the title may be treated as surplusage. Application refused. *Re Clerk*, 2 A.J.R., 48. *Molesworth, J.* (1871). V.

3.—Onus probandi—Marking out—Special case.]—In a complaint for possession on the ground that defendants are in illegal possession, not having marked according to by-laws: *Semble*, that the onus of proof rests on the defendants. *Semble*, that a Warden may state a special case as to the admissibility of evidence. *Palmer v. Chisholm*, 5 A.J.R., 169. *Molesworth, J.* (1874). V.

4.—Evidence of Warden—Admissibility.]—The parol evidence of a Warden who held an



inquiry on a lease application as to what a witness stated on such inquiry is admissible, although he is bound to transmit in writing the evidence taken before him to the Minister. *Weddel v. House*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1883). V.

5.—Great seal—Governor's signature.]—*Per Martin, C.J. (arg.)*, at p. 45:—"The Courts do not take judicial cognisance of the Governor's signature." *King v. M'Ivor*, 4 N.S.W.L.R. (L.), 45 (1882). N.S.W.

6.—Map referred to in map mentioned in certificate of title, admissibility of.]—Where a parish map, referred to in a certificate of title, contained certain figures and letters, *held*, that another map was not admissible in evidence for the purpose of explaining what those letters and figures meant. *Clarke v. Couper*, 10 N.S.W.L.R. (L.), 106; 5 W.N., 125. *Darley, C.J., Windeyer and Foster, J.J.* (1889). N.S.W.

7.—Parish map.]—*See Smith v. Neild*, 10 N.S.W.L.R. (L.), 171; 6 W.N., 55 (1889).

8.—Removal of quartz by trespasser—Evidence to support decree for accounts—Evidence of trespass.]—*See TRESPASS.*

9.—Criminal law—Shareholder in mining company—Perjury—Materiality—Admissibility of minute-book and depositions.]—*See CRIMINAL LAW*, 4.

10.—Mining partnership—Liability on winding up—Deed of settlement unsigned—Presence at meetings—Director—Payment of previous calls—Estoppel.]—*See PARTNERSHIP*, 18.

11.—24 Vic. No. 21—Registration—Appointment of manager—Right to sue company—Admissions of manager—Memorial.]—*See COMPANY*, 96.

12.—Transfer of gold mine—Fraud.]—*See PRACTICE*, 313.

13.—Warden's decision—Proceedings before justices for forcibly taking possession of claim.—Mining Act 1874, sec. 129.]—*See PRACTICE*, 422.

14.—Execution of mineral lease—Sealing—What constitutes a lease.]—*See CROWN LANDS*, 13.

15.—"Mining surveyor or experienced miner"—Coal Mines Act, sec. 38—Authority of Minister.]—*See COAL*, 1.

16.—Evidence—Of land being a measured portion—Of land being Crown lands at time of selection—Of population of area—Census Act.]—*See CROWN LANDS*, 15, 16.

17.—Admissibility of Stock Exchange Rules—Contract with broker.]—*See COMPANY*, 229.

18.—Proof of incorporation—Larceny of ore.]—*See CRIMINAL LAW*, 6.

19.—Ratification of directors' acts by shareholder—Moving adoption of report at meeting.]—*See COMPANY*, 369.

20.—Promissory note—Contemporaneous agreement.]—*See BILL OF EXCHANGE*, 1.

21.—Company—Proof of incorporation—Onus of proof.]—*See COMPANY*, 83.

22.—Parol agreement—Partnership—Interest in land under Mining Act 1874—Chattel interest.]—*See PARTNERSHIP*, 21, 22.

23.—Compensation for lands taken—Mineral contents of land—Onus probandi—Practice as to new trial.]—*See COMPENSATION*, 9.

24.—Admissibility of, to vary written agreement—Specific performance.]—*See SPECIFIC PERFORMANCE*.

25.—Possession—Lessor and Lessee—Underground workings.]—*See LEASE*, 61.

26.—Written contract—Parol evidence—Warranty.]—*See COMPANY*, 242.

27.—Registration of claim by Mining Registrar—How far conclusive.]—*See MINER'S RIGHT*, 39.

28.—Articles of Association—Minute-book.]—*See COMPANY*, 4.

29.—Notice of call—Signature of secretary—Authority of.]—*See COMPANY*, 4.

30.—Companies Act 1864 (S.A.)—Minute-book—Contents of notice therein stated.]—*See COMPANY*, 119.

31.—Liability for calls—Application for shares—Register of shareholders.]—*See COMPANY*, 34.

32.—Action of deceit—Promoters' liability—Prospectus—Paid-up shares—Material facts.]—*See COMPANY*, 139.

33.—Conversion of auriferous earth—Evidence of property.]—*See CONVERSION*.

34.—Trespass—Gross carelessness as to boundaries—Location of a grant—Part of a defendant's plan treated as an admission—Rejection of other parts of plan.]—See **TRESPASS**.

## EXCEPTIONS

1. — Water for general use — Exception to grant.]—See **WATER**.

2.—Water license—Exception for irrigation purposes.]—See **LICENSE**, 15.

## EXCESS

See **FORFEITURE**.

## EXECUTION

See **COMPANY XXIV.** ; **PRACTICE**.

## EXECUTORS

See **LIEN** ; **COMPANY**, 331 ; **ADMINISTRATOR**.

## EXEMPTION

See **PRACTICE**, 466.

## EXISTING INTERESTS

See **BY-LAWS AND REGULATIONS**.

1.]—A Warden's order dated 26th January, 1866, made under the Act No. 153 (repealed by the *Mining Statute* 1865, which came into operation on 1st January, 1866), for drainage fees, was held to be valid, as the summons had been issued, attended, and adjourned before the 1st January, 1866. It was "a matter or thing lawfully had or done" before the commencement of the repealing Act; and the Act provides that such proceed-

ing shall be proceeded with, determined, and enforced, as if there had been no repeal. *Reg. v. Webster*, 3 W. W. & A'B. (L.), 17. Banco (1866). V.

2.—Enforcing forfeiture.]—All existing rights and interests are saved by sec. 80 of the *Mining Statute* 1865. A penalty or forfeiture incurred under the Act No. 32 may be enforced according to that law, but the two systems (in Act No. 32, and in Act No. 291) are not to be mingled together, and forfeitures committed under one, enforced under the other. The by-laws under which a claim has been registered, and not the circumstance of the forfeiture having occurred since the passing of the Act No. 291, determine under which system any forfeiture is to be deemed to have taken place, and according to which system it is to be enforced. *Reg. v. Clow*, 5 W. W. & A'B. (L.), 89. Banco (1868). V.

## EXTRAORDINARY MEETING

See **COMPANY**, VIII.

## FINE

Circumstances under which Warden may impose fine instead of forfeiture.]—See **FORFEITURE**, 63, 64.

## FIXTURES

1.—Jurisdiction of Warden—Mining tenement—*Mining Statute* 1865, secs. 5, 101, 177, 195.]—See **PRACTICE**, 409.

2. — Fixtures on residence area — Right to remove.]—See **RESIDENCE AREA**.

3. — Mortgage — Quicquid plantatur solo, solo cedit—Boller.]—See **MORTGAGE**, 10.

## FOREIGN ATTACHMENT

See **PRACTICE**.

## FOREIGN CORPORATION

See COMPANY ; PRACTICE.

## FOREIGN JUDGMENT

See PRACTICE.

## FORFEITURE

See ABANDONMENT ; BY-LAWS AND REGULATIONS ; CHAMPERTY, 5 ; CLAIM ; COMPANY, III., XX., XXIV. ; CROWN LANDS ; EXISTING INTERESTS ; LEASE ; LIEN ; MINER'S RIGHT ; MORTGAGE ; PARTNERSHIP ; PRACTICE ; SUSPENSION.

1. — Abandonment — Trespass.] — A Maryborough By-law (1859), provided that a quartz claim should be taken possession of by erecting two posts on the line of reef, one at each boundary. The claim then extended along the line of reef for the space between the posts and 150 feet on each side of the line. In pursuance of this by-law L. took up a quartz claim, but on one side of the line he could not take up the whole of the 150 feet, to which he would have been otherwise entitled, as an alluvial claim previously taken up by C. was occupied on that side. Some time after L. had taken up his quartz claim, C. abandoned his alluvial claim. On the abandonment by C., L. did not repeg or retake possession in any way. Subsequently B. took up the alluvial claim abandoned by C. ; L. sued B. for trespassing on his quartz claim, contending that immediately on C.'s abandoning the alluvial claim he became at once entitled to the whole of the 150 feet on that side. *Held*, that as L. had done nothing on the abandonment by C., L.'s claim remained as it was ; that B. was right in taking up the whole of the abandoned claim, and that he was not a trespasser. *Landry v. Burton*, A.R., 28th June, 1862. V.

2.—Adjudication by Warden.]—Under the Act No. 32, before miners could avail themselves of a forfeiture or a constructive abandonment of a claim in the actual possession of other miners, they were bound first to obtain the adjudication of the Warden on the subject. *Critchley v. Graham*. 2 W. & W. (L.), 211. Banco (1863). V.

3.]—An adjudication of forfeiture or abandonment by the Warden enures only to the party in whose favour the Warden decides. It cannot be taken advantage of by others. *Ibid*. V.

4.]—"If a forfeiture is to be worked, there should be express words to say so."—*Per Staveell, C.J. Thomas v. Kinnear*, 2 W. & W. (L.), 239. (1863). V.

5.—Adjudication by Warden.]—Martin abandoned his claim. Mason took possession of it without obtaining the adjudication of a Warden. Dunbar obtained an adjudication against Martin, but the Warden declined to enforce his decision as between Dunbar and Martin, because Mason was in possession. Application for *mandamus* to compel the Warden to put Dunbar in possession was refused. *Critchley v. Graham*, 2 W. & W. (L.), 211, distinguished. "Putting the case of *Critchley v. Graham* on its limited footing of a decision, that the adjudication of a Warden is necessary to foreclose the rights of the original holder of the land, on a proceeding between that original holder and a claimant of the same land on the ground of forfeiture, it does not apply in a contest between an intruder and a person who asserts that he is the first or actual holder."—*Per Barry, J. Re Drummond, ex parte Dunbar*, 2 W. & W. (L.), 280. Banco (1863). V.

6. — Curing forfeiture.] — Where a miner allowed his claim to become liable to be declared forfeited, yet did not abandon it, but simply resumed work upon it : *Held*, that the subsequent work did not cure the forfeiture previously incurred. "It was decided in *Critchley v. Graham*, 2 W. & W. (L.), 211, that possession as for forfeiture can only be taken after an adjudication of forfeiture by the Warden. To make the land unoccupied so that the defendants—the holders—could have taken it up as a new claim, it should either have been actually abandoned by them or adjudged by the Warden to have been forfeited ; otherwise all forfeitures might be evaded by a mere resumption of work and going through the form of re-pegging the ground, and the by-law thus be totally evaded."—*Per Molesworth, J. Coles v. Sparta*, 3 W.W. & A'B. (M.), 22 (1866). V.

7.—Working a claim.]—Where a by-law provided that pumping out water should be a protection to a claim from forfeiture for non-working : *Held*, that pumping out water with the design

of reaching and working at earth within the claim is working it; not if with other designs. Using a claim for a well is not using it for a mine so as to save forfeiture. *Longbottom v. White*, 3 W.W. & A'B. (M.), 35. *Molesworth, J.* (1866). V.

8.—Block and frontage claims—Distinct titles.]—"I would not hold the taking up of a block claim within their (frontage) area as a forfeiture of their right to the entire. But the case is different as to the precise block claim taken up. I think generally no one has a right to hold simultaneously two claims on the same space under distinct titles and terms. For instance, as to forfeiture for not working, he would have no right as to his block claim, to defeat an adverse claimant, by showing that he had a frontage claim of which the block claim formed a part, and had been working the frontage. And I think generally, no one should be permitted to complicate his case by combining simultaneous rights, but that the acquisition of a later should be a merger of former rights."—*Per Molesworth, J. United Extended Band of Hope Co. Regd. v. Tennant*, 3 W.W. & A'B. (M.), 53 (1866). V.

9.—Registration—Mistake.]—Where A. was registered for a claim by the mistake of the registrar, others being registered as owners at the time, and A. forfeited the claim by leaving it unworked: *Held*, that under the Sandhurst By-law No. 6, sec. 9, a party who had obtained a declaration of forfeiture from the Warden against A., and an order that he should deliver up possession, could not take possession of the claim as against those who had been registered at the time of his registration, without giving notice to them and obtaining a declaration of abandonment by the Warden. *Hunter v. Atraveld*, 3 W.W. & A'B. (M.), 59. *Molesworth, J.* (1866). V.

10.—Abandonment.]—"The title to mine on the Crown lands of Victoria, from their being first let open to miners, has been based on possession; the person first taking such possession, under restrictions imposed, being held to have the best right. It seems reasonable, therefore, that a right originating in possession should terminate with cesser of possession—indeed with cesser of use of the land possessed. In *Critchley v. Graham*, 2 W. & W. (L.), 211, the Court had to deal with the case of defendants claiming by

forfeiture against plaintiffs, in clear visible possession, and intimated that it would decide otherwise in case of actual abandonment. In a previous case, *Landry v. Burton* (see 1, *supra*), it was taken for granted that abandonment without a Warden's order put an end to title. People forgetting a right as valueless would never expressly say they abandoned it."—*Per Molesworth, J. Warrior G.M. Co. Regd. v. Kohinoor G.M. Co. Ltd.*, 3 W.W. & A'B. (M.), 90 (1866). V.

11.—By-law.]—D. registered the suspension of his claim under a by-law which required work to be resumed within twenty-four hours after the expiration of the period of registration, otherwise forfeiture. D. was prevented from resuming work in consequence of his claim being flooded, and it was admitted he could not drain it, except at a ruinous expense. *Held*, that the by-law applied to the case; that it was not invalid as unreasonable; and that a forfeiture had been incurred. *Duffy v. Tail*, 4 W.W. & A'B. (M.), 17. *Molesworth, J.* (1867). V.

12.—Abandonment — Frontage and block claims.]—Where the holder of a frontage claim takes up a block claim within his frontage claim he renounces the frontage to the extent of the block claim. *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.), 41. *Molesworth, J.* (1866). *Great North West Co. v. Sayers*, 4 W.W. & A'B. (M.), 64. *Molesworth, J.* (1867). V.

13.—Illegal possession—Marking out.]—The Full Court, in *Critchley v. Graham*, 2 W. & W. (L.), 211, held, as to the Act No. 32, sec. 77, that persons wishing to avail themselves of a forfeiture should proceed to recover through a Warden instead of entering as upon vacant ground, and that mere entry to take advantage of a forfeiture was unavailing. That principle, and the enabling words of the clause equally apply to persons seeking to deprive miners in possession of too much. The *Mining Statute* 1865, sec. 101, is not distinguishable from Act No. 32, sec. 77, as to words enabling a district judge to give possession to claimants, and sec. 177 gives similar powers to Wardens. *Barlow v. Hayes*, 4 W.W. & A'B. (M.), 71. *Molesworth, J.* (1867). V.

14.—Parties—Joint application.]—Where five persons were alleged to be in illegal possession of more ground than they were entitled to, under the by-laws; and five other persons,

holders of miners' rights, applied jointly to be put in possession of the said ground: *Held*, that the Warden could entertain the joint application, and put the complainants in possession, and that no previous marking out by the complainants was necessary. The word "person" in the definition of the word "claim," in sec. 3 *Mining Statute* 1865, embraces the plural. *Barlow v. Hayes*, 4 W.W. & A'B. (M.), 72. *Molesworth, J.* (1867). V.

**15.—Amalgamation — Enforcing forfeiture — Miner's right.**—The amalgamation of a claim, liable to forfeiture, with other ground legally held, will not cure the forfeiture, although since the amalgamation such work had been done as would save the amalgamated claim as an whole from forfeiture for omission to work in that time. Forfeiture makes the interest not void but voidable. It is not necessary that the person seeking to enforce the forfeiture should have had a miner's right at the time when the forfeiture was incurred. It is sufficient if he has one when complaint is made. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74. *Molesworth, J.* (1867). V.

**16. — Ground held under different titles — Working in connection with a claim.**—“I intimated in *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.), 41, and decided in *Great North-west Co. v. Sayers*, 4 W.W. & A'B. (M.), 64, that persons entitled to a frontage claim taking up a block claim within its limits were thenceforth entitled to the block claim as such only, with all liabilities to forfeit it.”—*Per Molesworth, J. Ibid.* V.

**17.]—In *Sichel v. Pearce*** (Supreme Court, Victoria, 11th and 12th September, 1861), the Full Court held the judge of the Court of Mines wrong in directing the assessors that working on leased land could not be considered as working in connection with a claim held under a by-law. Working on other land may be a working to save a forfeiture of a claim, if done with a decided intention to mine the claim, and with as great rapidity as to result as working on the claim itself might reasonably have. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 80. *Molesworth, J.* (1867). V.

**18.—Miner's rights.**—“As to the argument that the forfeiture of 1865 was of an interest only pending the current miners' rights of the defendants, I do not think it available for persons

claiming a permanent interest for what was then done, and for that reason only having a pretence to more than the rest of the public. Claims to mine on Crown lands are dependent for their continuance or means of legal enforcement upon the renewal of miners' rights, but still are in the nature of permanent estates, and are not confirmed by that which is a means of renewal.” *Per Molesworth, J. Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 84 (1867). V.

**19.—Curing a forfeiture — Suspension.]—A** second certificate for suspension from work under the Maryborough By-laws, will not cure a forfeiture incurred during the existence of a prior certificate, the conditions of which have not been complied with. *Tait v. Henderson*, A.R., 12th March, 1867. V.

**20.—Enforcing forfeiture.]—*Semble*,** where a by-law enacts a forfeiture, but omits to say by whom it is to be enforced, the forfeiture may be enforced by any holder of a miner's right. *Oxley v. Little*, 5 W.W. & A'B. (M.), 14. *Molesworth, J.* (1868). V.

**21.]—An applicant enforcing forfeiture is** entitled only to one man's ground, not all the ground the defendants may occupy. *Ibid.* V.

**22.—Holding too much ground.]—*Semble*,** that taking up too much ground does not work a forfeiture of the whole. *Mulcahy v. Walhalla G.M. Co. Regd.*, 5 W.W. & A'B. (E.), 103. F.C. (1867-8). V.

**23.—Abandonment in fact—Constructive forfeiture.]—“The next objection is that the** ground said to have been abandoned ought to have been declared abandoned by a Warden before the plaintiffs were at liberty to occupy it; but the cases which require such an adjudication are those of constructive forfeiture, and not of abandonment in fact.” *Ibid.* V.

**24.—Enforcing forfeiture.]—Where a claim-**holder discontinued work and failed to post a notice required by a by-law of his district, thereby rendering the claim liable to forfeiture, and another party of miners took possession of the claim without a Warden's order: *Held*, that the principle of *Critchley v. Graham*, 2 W. & W. (L.), 211, applied, and that the forfeiture could only be enforced by legal proceedings. “Unless the claim be actually abandoned, the persons alleged to have forfeited should be summoned before a

Warden to dispossess them."—*Per Molesworth, J. Collins v. O'Dwyer*, 5 W.W. & A.B. (M.), 30 (1868). V.

25. — Abandonment — Frontage and block claims.]—The Ballarat By-laws provided for the taking up of claims known as frontage claims, and also for the taking up of claims known as block claims. Where the owner of a frontage claim took up a block claim within the frontage claim, it was held that the taking possession of the block claim afforded evidence of abandonment of that part of the frontage included in the block, evidence, moreover, to be taken most strongly against the party so acting. *McCafferty v. Cummins*, A.R., 24th June, 1868. V.

26.—Frontage and block claims.]—Generally where a space of ground, included in frontage claims of two companies on two different leads, is taken up as a block claim by one of them, the other is not entitled to say that the taking up of the block claim is effectual, so as to determine the frontage interest of the company taking it, and at the same time to say that it is ineffectual as against its own frontage claim. As between the company taking up the block claim and the mining public, individuals of the public admitting the title to the block claim may say that the block claim is the only title of those taking it up, and it may be forfeited for non-performance of the conditions on which it is held; but otherwise as to a company denying the title to the block claim against them, the contest between the two companies should be carried on as before the block claim was taken up. *United Working Miners G.M. Co. Regd. v. Prince of Wales G.M. Co. Regd.*, 5 W.W. & A.B. (M.), 50. *Molesworth, J.* (1868). V.

27.—Frontage and block claims.]—The holder of a frontage claim taking up a block claim within it relinquishes his frontage rights to the extent of the block claim, because in rights originating in taking possession, a new taking possession is inconsistent with asserting a former right to the same parcel of land by means of possession. A frontage claim may comprise within its boundaries land exempt from being taken as a claim, and the exemptions may cease. It may comprise a block claim afterwards forfeited or abandoned. The holder of the frontage claim may have doubts of his title. In these instances he has the same right of taking up as the rest of the

public without forfeiting his whole frontage right. *United Extended Band of Hope Co. v. Tennant*, 3 W.W. & A.B. (M.), 41; *Clerk v. Wrigley*, 4 W.W. & A.B. (M.), 74; and *McCafferty v. Cummins*, A.R., 24th June, 1868, examined. *Ibid.* V.

28.—Re-registration — Re-pegging — Application for lease.]—C., on the 28th April, 1868, pegged out and registered under the Beechworth By-laws an ordinary quartz claim. On the 18th May, and again on the 26th May, he registered a quartz tunnelling claim, the boundaries of which included the quartz claim originally marked. There is no such claim known in the Beechworth By-laws as a quartz tunnelling claim. On the 9th September C. re-pegged out the original quartz claim, but did not re-register. On the 25th September a lease of the whole of the land was applied for, and on the 5th of November O'S. proceeded before the Warden to obtain a declaration of forfeiture and possession. *Held* (1.)—That each successive registration by C. constituted an abandonment of his previous title. (2.) That the re-pegging of the original quartz claim in September, not being followed by registration, did not redeem or revive his title to that claim. (3.) The lease application afforded no protection to, or alteration in any previous title. *O'Sullivan v. Clarke*, A.R., 2nd Dec., 1868. V.

29. — Vagueness — Amendment — Shape of claim.]—Where a complainant before the Warden seeks to be put in possession of a portion of the ground occupied by others, the summons should disclose what portion is sought. Such a summons if not descriptive should be dismissed on the ground of vagueness and want of description unless the complainant desires to amend. The Warden has power to amend on terms. A Sandhurst By-law provided that a claim known as a "special holding" should be in a rectangular form. A claim purporting to be a special holding was taken up by miners, but not in a rectangular form, as the nature of the ground rendered it impossible to take it up in that way. *Held*, that the by-law was imperative. "Defendants might find their large rectangular quantity where they could, but not small spaces bounded by acute angles or curves. If such were especially valuable it was just a reason for their being left to persons taking small quantities, and not

monopolised." *Roscrow v. Webster*, 5 W.W. & A'B. (M.), 64. *Molesworth, J.* (1868). V.

**30. — Abandonment — Surveyor — Provisional claim-holders—Penalties.]**—When a lead is discovered (*Beechworth By-law No. 14*, 19th November, 1867), and the surveyor has an office or temporary office within ten miles of a provisional claim-holder (*By-law No. 19*), the claim-holder is bound to call upon him to act. If he has no office within ten miles, the claim-holder is not so bound; and neglect to do so, and deferring the working of the provisional claim, do not constitute proof of abandonment in view of the terms of *By-laws No. 14 and No. 19*. "When it (the lead) is discovered, and the surveyor is within ten miles, I think provisional claim-holders are bound to call upon him to act under *By-law No. 19*, but in this instance were not, but then I think that any person interested is entitled to call upon the surveyor to mark off substituted claims, and that he should do so along a straight line to avoid overlapping, as far as required by any person interested, from time to time, taking measures to inform provisional claim-holders of what he is doing, and that as soon as he so lays off the substituted claims the successive claim-holders not working become liable to penalties." —*Per Molesworth, J. Atwell v. Ryan, Atwell v. Landrigan*, 6 W.W. & A'B. (M.), 24 (1869). V.

**31.—Possession under Warden's order—Excess of ground.]**—When a person is put in possession of ground by a Warden as abandoned, the person so put in possession may occupy other ground adjoining it as portion of his claim, if the whole area does not exceed that allowed by the by-laws to the holder of a miner's right. *Seemle*, that occupying too much ground does not work a forfeiture of the whole, but only of the excess. *Bryson v. McCarthy*, 6 W.W. & A'B. (M.), 36; N.C., 19. *Molesworth, J.* (1869). V.

**32. — Tribute agreement — By-laws — Lis pendens.]**—The 44th *By-law* of the *Beechworth Mining District* (gazetted 25th June, 1869), provides that the registered lawful owner of a tenement who has employed a person to represent him in connection with such mining tenement, either by contract or on tribute, shall not forfeit any of his rights or interests through any neglect, absence, or omission of such employé; provided that such lawful owner shall have such mining tenement duly represented within seven days of

service of a notice threatening forfeiture. A mining company let their claim on tribute for six months, and the tributors, with the consent of the company, gave up work, and the company obtained a suspension order, but on the expiration of the order did not resume work. *Held*, that the company was not entitled to a notice under the above by-law, before a complaint for forfeiture could be brought, inasmuch as the company had consented to the tributors abandoning their agreement. *O'Sullivan v. Mysterious Q.M. Co.*, 1 V.R. (M.), 4; 1 A.J.R., 13. *Molesworth, J.* (1870). V.

**33.]—O'S.** applied by Warden's summons to be put in possession of the claim of the *Mysterious Company* on the ground of forfeiture. It was contended for the defendant company, that one E. had, before the commencement of the present proceedings, brought a complaint before the Warden against the company asking for declaration of forfeiture and order for possession. The Warden had dismissed that complaint, but E. had appealed to the Court of Mines, and the appeal was pending (though ultimately dismissed) at the time of the commencement of proceedings by O'S. *Held*, that the pendency of E.'s appeal had no bearing on the matter. *Ibid.* V.

**34.—By what by-laws determined.]**—The conditions of forfeiture of a claim are to be determined by the by-laws in force at the time the claim was taken up. The persons by whom, and the manner in which the forfeiture may be taken advantage of, are to be determined by the by-laws in existence at the time the forfeiture is attempted to be enforced. *Mitten v. Spargo*, 1 A.J.R., 70. *Molesworth, J.* (1870). See CHAMPERTY, 5. V.

**35.—Mining Statute 1865, sec. 101, sub-sec. 1 — Parties—Possession—Disclaimer—Costs.]**—In a suit in the Court of Mines for possession of a mining tenement on the ground of forfeiture brought by T. and others against B. and others, no evidence was given of actual occupation or possession by any of the defendants; but it was proved that one of the defendants had represented himself as having taken possession under a miner's right, that he was registered in the books of the Mining Registrar through that representation, that he still continued to be a registered owner, and that he had not parted with his quasi legal estate. It appeared also by



the registration that he had represented himself as the agent and trustee of another of the defendants—a registered company. The judge of the Court of Mines decided that there could be no forfeiture under sec. 101, sub-sec. 1, *Mining Statute* 1865, unless the defendants were in possession, and as it appeared from the evidence that one of the defendants was not in possession, and did not claim to be in possession, and as it did not appear from the evidence that the other defendants had ever been or claimed to be in possession, he dismissed the suit. On appeal to the Chief Judge: *Held*, that the plaintiffs had reasonable grounds for supposing that all the defendants claimed an interest, and that the judge was wrong. By sec. 101, sub-sec. 1, the jurisdiction seems limited to cases of lands in which some person other than the plaintiffs shall be or shall claim under miner's right, &c., to be entitled to be in the occupation or possession. This does not mean that no person can be made a defendant who claims no right, and plaintiffs are often at a loss to find who the real claimants are, especially when they are enforcing forfeiture against those who neglect to work and absent themselves from the claim, and they can only feel secure as to their title acquired by summons, by serving all those who have possession or any pretence of right. If without reasonable grounds they proceed against persons who disclaim, especially if they seek costs, they should be visited with costs."—*Per Molesworth, J. Thompson v. Begg*, 2 A.J.R., 5 (1871). V.

**36.—When fine inflicted in lieu of forfeiture—Undoubted neglect—Technical errors.]—**When the Court has an option of inflicting a fine or enforcing a forfeiture for breach of by-law: *Seem*, that it will inflict a fine when early neglect has been followed by zealous continuous work, or when claim-holders have fallen into merely technical errors, but not where there has been undoubted neglect. *Thompson v. Begg*, 2 A.J.R., 35. *Molesworth, J.* (1871). V.

**37.—Collusion—Invalidity of by-law.]—**In 1865 R. took up a claim under the Sandhurst by-laws. One of the by-laws then in force, made under the Act No. 32, provided for compensation in case of eviction on a forfeiture. In February, 1872, H. applied to be put in possession of R.'s claim on the ground of forfeiture. An order was made in favour of H., but directed him to pay

compensation as a condition precedent to possession. H. took possession without paying, registered himself for the claim, and transferred it to S., who entered and held possession till the 19th March, when R. instituted a suit in the Court of Mines against S. for trespass. On the trial it appeared that on the 1st of March, 1872, B., colluding with R., summoned R. before the Warden as for forfeiture of the ground, and on the 12th of March obtained an order for possession, took it, registered himself as owner, and then transferred to R., who obtained registration and brought the suit. On special case from the Court of Mines for the opinion of the Chief Judge *Held*—(1.) That the by-law was invalid as to compensation under the Act No. 32. (2.) That S. was not justified in taking possession until either the money had been paid, or that portion of the Warden's order quashed. (3.) That B's summons not having been served on S., the order obtained by B. did not affect the rights of S. (4.) That B.'s suit was a mere collusion, and that the plaintiff could not succeed. "In the case of claim-holders having committed a forfeiture, and subject to eviction by an informer, I do not think a collusive recovery by a friend undertaking to hold as a trustee, should be allowed to form a new title for the defaulter."—*Per Molesworth, J. Reardon v. Sayers*, 3 A.J.R., 128 (1872). V.

**39.—Fiduciary relationship—Co-owners—Forfeiture of lease.]—***See PRACTICE*, 321 (b).

**40.—Amalgamation—By-laws—Protection—Registration.]—***Seem*, that when by by-laws the amalgamation of claims is effectual for all purposes of working, it is also effectual for all liabilities for not working or for false excuses for not working, and so *held*, as to Ballarat by-laws. By-law XI, *Gazette*, October 23, 1873. When a protection registration for non-working has been obtained by a false declaration, the claim is liable to forfeiture. *Seal v. Bebro*, 5 V.L.R. (M.), 4. *Molesworth, J.* (1879). V.

**41.—By-laws—Construction.]—**By-laws should be construed according to rules which have been applied to Acts of Parliament by Courts of Justice. A by-law provided that in certain events, a claim "may by a competent Court be declared forfeited." *Held*, that these words did not give a Warden discretionary power to refrain from enforcing a forfeiture



should the circumstances appear to him sufficient to warrant such a decision as being equitable. It is not to be understood that such words are mandatory in every case in which liability to forfeiture has been incurred under its precise terms. The decision depends on the particular case. *Lawlor v. Stiggants*, 2 V.L.R. (M.), 18. *Molesworth, J.* (1876). V.

42.—Decree—Title.]—The holder of a miner's right who obtains a decree of forfeiture of a claim does not thereby acquire any title to the claim; the decree only removes an obstructing title, and on his taking possession he must go through the ordinary formalities as to acquiring title. See *Moore v. White*, 4 A.J.R., 17. The person establishing a forfeiture does not necessarily take the same claim as the person whose title he impugns. In some classes of claims he might not be entitled to as much or he might wish to include in his claim some additional ground. *Beavan v. Rigby*, 2 V.L.R. (M.), 12. *Molesworth, J.* (1876). V.

43. — *Lis pendens* — Inchoate right.] — B. brought plaint against R. for forfeiture of claim. The Warden was inclined to find for complainant, but stated special case at request of R. Pending the hearing of the special case H. took possession of the claim as abandoned, under Act No. 446, sec. 27. The special case was determined in favour of the complainant, and Warden subsequently made an order in favour of B. On B. taking possession, H. sued him in trespass. *Held*, that the taking up by H. or any other stranger could not give him title as against B.; nor could H. take advantage of any lien or right of R. as between R. and B. *Harwood v. Beavan*, 2 V.L.R. (M.), 16. *Molesworth, J.* (1876). V.

44.—Summons — Amendment — By-law.] — A summons before a Warden for forfeiture should allege distinctly the grounds on which the forfeiture is sought, and the by-laws which have not been complied with. If such allegation be omitted, the Warden may amend. *Semble*, that claims are not affected by by-laws passed subsequently to their having been taken up. *Hooke v. Burke*, 4 A.J.R., 122. *Molesworth, J.* (1873). V.

45.—Mining lease—Jurisdiction of Warden—Mining Statute 1865 (No. 291), secs. 3, 45, 71 (vii.), 101, 177.]—A Warden has jurisdiction to entertain a complaint for forfeiture of a gold-

mining lease for non-performance of the labour covenants. But the holder of a miner's right cannot enforce the forfeiture until the lease has been declared forfeited by the Governor-in-Council. *M'Millan v. Dillon*, 6 V.L.R. (M.), 15; 1 A.L.T., 203. *Molesworth, J.* (1880). V.

[Explained by *Ives v. Lalor*; see LEASE, 40.]

46.—Mining lease—Continuing forfeiture—Receipt of rent—Waiver.]—*Per Higinbotham, J.* :—Receipt of rent is not a waiver of a continuing forfeiture. *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.), 70; 3 A.L.T., 68, 121 (1881-2). V.

47.—Notice of forfeiture—Date of publication—Government Gazette.]—The publication in the *Government Gazette* of a notice of forfeiture dates from the time of the *Gazette* being fully printed, and not from the time it is accessible to the general public. *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth, J.* (1882). V.

48. — Forfeitures — Protection orders — How construed by Courts.]—*Per Molesworth, J.* :—“Courts are generally rigid as to construing laws imposing forfeitures, and for the same reason should be lax in construing provisions protecting from forfeitures.” *Weddell v. Howse*, 8 V.L.R. (M.), 44, at p. 50; 4 A.L.T., 95 (1882). V.

49.—Gold mining lease—Forfeiture—Re-entry by Crown.]—Where a gold mining lease is declared forfeited, it is not competent for anyone other than the lessees to take the objection that the lease is not determined until re-entry by the Crown. *Weddell v. Howse*, 8 V.L.R. (M.), 44; 4 A.L.T., 95. *Molesworth, J.* (1882). V.

50.—Protection order—Neglect to post certificate.]—The period allowed by a protection order, protecting a mining claim from forfeiture for non-working, is in some degree a judicial act of the Registrar, and the neglect of the claim-holder to procure or post the certificate, as required by the by-laws, does not deprive him of the benefit of the protection from forfeiture. *Weddell v. Howse*, 8 V.L.R. (M.), 44; 4 A.L.T., 95. *Molesworth, J.* (1882). V.

51.—Forfeiture of claim for breach of by-laws.]—A by-law imposing a forfeiture of a mining claim if “less than the minimum number of men

required by these by-laws have been employed thereon," is applicable to a claim taken up under a by-law requiring that the holder shall continue to work with two men on such claim, though an apparently more special object for the operation of such first-mentioned by-law is furnished by another by-law prescribing for certain claims a proportion between the extent of ground occupied and the number of men to be kept at work upon it. *Hunter v. M'Nulty*, 13 V.L.R., 416; 9 A.L.T., 33. *Webb, J.* (1887). V.

52.—*Mines Act 1890* (No. 1120), sec. 106, sub-sec. 7—*Power of making by-laws under.*—The power of making by-laws, given to the Mining Boards by sec. 106, sub-sec. 7, of the *Mines Act 1890* (No. 1120), is limited to the making of by-laws for determining the events on which the title to land, or an interest in land, shall be forfeited. *Boyd v. Hayes*, 18 A.L.T., 80; 2 A.L.R., 229. *Hood, J.* (1896). V.

53.—*Mines Act 1890* (No. 1120), sec. 106, sub-sec. 7 — *Ballarat By-laws No. XI., sec. 36 — Forfeiture of share in co-operative mining partnership — Jurisdiction of Warden.*—Where a by-law was made in pursuance of the power conferred by sec. 106, sub-sec. 7 of the *Mines Act 1890* (No. 1120), for determining "the events upon which a share in a claim shall be forfeitable": *Held*, that a Warden had no jurisdiction to hear and determine a complaint, brought under the by-law, claiming a declaration that the defendant's share in a co-operative mining partnership was forfeitable, and that the Warden's jurisdiction under the by-law was limited to determining the forfeiture of a share in a claim. *Boyd v. Hayes*, 18 A.L.T., 80; 2 A.L.R., 229. *Hood, J.* (1896). V.

54.—*Forfeiture of claim—Suspension certificate.*—See *CERTIFICATE*, 1, 2.

55.—*Lease—Regulations—Goldfields Act 1866—Crown.*—C., under the *Goldfields Act 1866* (repealed), leased a certain claim from the Crown, and then did not comply with the Regulations of 14th February, 1870, thereunder; S. and others deeming the lease thereby forfeited, entered upon the said claim. In an action of trespass against them by C.: *Held*, on demurrer, that the non-compliance with the regulations did not, *ipso facto*, work a forfeiture, but that some act of the Crown evidencing its intention of hav-

ing exercised the right to forfeit, was necessary. *Chappel v. Samper*, 11 N.S.W.S.C.R. (L.), 138. *Stephen, C.J., Hargrave and Faucett, J.J.* (1872). N.S.W.

56.—*Lease—Re-entry.*—“All Courts, whether Courts of equity or of law, lean against a forfeiture, and when they feel that a right of forfeiture has been harshly exercised, they do all in their power to find some loophole of escape for the person so treated from his position.” *Baker's Creek C.G.M. Co. v. Hack*, 15 N.S.W. L.R. (E.), 207; 10 W.N., 217, *per Owen, J.*, at p. 218; and see at p. 230, *per Darley, C.J.* (1894). See S.C., *LEASE*. N.S.W.

57.—*Action for forfeiture of lease—Parties—Goldfields Act (Q.) 1874* (38 Vic. No. 11), sec. 15 — *Claims Against Government Act 1866* (29 Vic. No. 23), secs. 2, 7.—A gold mining lease having been granted and rent paid, one O'F. came in and stated that the mine was not worked according to regulations. The question then came on before the Warden, who recommended the lease to be cancelled, which was done by the Government. A lease of the land in question was then made to another company. *Held*, in an action to set aside the forfeiture and to recover possession, that the Minister for Justice was not rightly joined in the action, and an application to strike out his name as a defendant was granted with costs. *Kirkbride v. Minister for Justice and New Day Dawn Freehold G.M. Co. Ltd.*, 3 Q.L.J., 163. *Harding, J.* (1889). Q.

58.—*Forfeiture of lease—Procedure to set aside.*—*Seemle*, the proper procedure for setting aside the forfeiture of a lease is under the *Claims Against Government Act 1866* (Q.), (29 Vic. No. 23). *Kirkbride v. Minister for Justice and New Day Dawn Freehold G.M. Co. Ltd.*, 3 Q.L.J., 163. *Harding, J.* (1889). Q.

59.—*Forfeiture.*—There is a material distinction between actual forfeiture and liability to forfeiture. Forfeiture can only be worked out by the judgment of a competent tribunal, lawfully set in motion for the purpose. *Robinson v. Blundell, Mac.*, 683. *Chapman, J.* (1867-8). N.Z.

60.—*Distinction between actual forfeiture and liability to forfeiture.*—There is a material distinction between actual forfeiture and liability to forfeiture under the N.Z. *Goldfields Acts*.

Forfeiture can only be worked out by the judgment of a competent tribunal, lawfully set in motion for the purpose. *Ibid.* N.Z.

61.—Right of holder of miner's right to institute proceedings.]—*Semble*, that any owner of a miner's right may institute proceedings for a forfeiture, and that a Warden has power to decree that a forfeiture shall enure for the benefit of the complainant. *Ching Tong Fong v. Lee Chung*, 1 N.Z.J.R., 139. *Chapman, J.* (1873). N.Z.

62.—Failure to renew certificate of registration—Forfeiture.]—Non-compliance with a regulation prescribing the annual renewal of certificates of registration does not necessarily work a forfeiture. *Woodward v. Earle*, 2 N.Z.J.R., 12. *Richmond, J.* (1874). N.Z.

63.—Water right—Failure to construct race—Forfeiture.]—*Semble*, that neglect to construct a water-race does not entail forfeiture so long as the water right is used for mining purposes. *Frater v. Howe*, 1 N.Z.J.R. (N.S.) M.L., 30. N.Z.

64.—Water right—Non-user—Abandoned race—Water used for other than mining purposes—Forfeiture.]—The owners of certain water rights let the water from time to time to various parties of miners; but during an interval of two months and a half the water was not used for mining, although work was then being done by the owner with a view to forming a water supply to a neighbouring town by means of his water rights. The race originally cut was totally disused, and the water allowed to flow down its natural course. A complaint, claiming an adjudication of forfeiture on these grounds, was dismissed by the Warden. *Held*, on appeal—(1.) That a forfeiture had been incurred by non-user of the water. (2.) That work done for other than mining purposes could not count as work done in connection with the claim or water rights; but (3.) That the Court would exercise its discretion, and impose a substantial fine instead of declaring a forfeiture. *Davis v. Robertson*, 1 N.Z.J.R. (N.S.) M.L., 36. N.Z.

65.—Goldfields Act 1866 (30 Vic. No. 32), sec. 62—Warden's jurisdiction—Forfeiture—Claim—Excess of ground.]—*See PRACTICE*, 232.

66.—Mining lease—Mortgagee in possession—Injury to mortgaged premises.]—*See MORTGAGE*, 8.

67.—Lease—Application by informant for lease—Marking out.]—*See LEASE*, 27.

68.—Declaration of forfeiture of lease—Suit for trespass by lessee before re-entry by Crown—Parties.]—*See LEASE*, 29.

69.—Marking out claim—Gazette notice of forfeiture of lease.]—*See CLAIM*, 17.

70.—Lease—Non-compliance with labour covenants—Forfeiture.]—*See LEASE*, 40.

71.—Proceedings for forfeiture of claim—Champerly.]—*See CHAMPERTY*, 5.

72.—Extended sluicing claim—Abandonment—Adjudication of forfeiture.]—*See ABANDONMENT*, 2.

73.—Forfeiture—Breach of labour conditions—Quartz prospecting area—Effect of subsequent registration.]—*See CLAIM*, 28.

74.—Death of claim-holder—Forfeiture—Abandonment.]—*See CLAIM*, 34.

## FORGERY

*See CRIMINAL LAW.*

## FORMS

Mining Statute 1865 (No. 291), sec. 212—Schedule 29—Notice of appeal from Warden to Court of Mines—Form of notice.]—Literal compliance with the form given in Schedule 29 is not requisite. Failure to fill up the blank left in the form for the insertion of the name of the place at which the proceedings had been heard by the Warden, does not make the notice of appeal bad. *Rees v. Carroll*, 11 A.L.T., 195. *Hood, J.* (1890). V.

## FRAUD

*See COMPANY*, 29, 60, 68, 81, 139, 142, 143, 144, 162, 236, 238, 242, 263, 336; *PARTNERSHIP*, 26, 27; *PRACTICE*, 313; *SPECIFIC PERFORMANCE*.

1.—Money had and received—Mining claim—Partnership.]—Action for money had and received, and for money obtained by certain fraudulent

lent representations. The plaintiffs, M., S., C. and W., with H. and the defendant, agreed to purchase the "Lord Byron" claim. The defendant, for himself and the plaintiffs, inspected the mine, and informed the plaintiffs that he had purchased for £800, on certain terms. N. was then substituted for H. The plaintiffs and the defendant agreed to issue a prospectus, and work the mine by a company, and it was placed in the defendant's hands to float. Each of the speculators (the plaintiffs and the defendant) were to receive a sum of money and a number of paid-up shares. The plaintiffs again joined the defendants in the purchase of a claim called the "Anthony Trollope." The defendant alleged that the purchase-money was £1200, and of that sum £400 was paid on account. The "Anthony Trollope" was also formed into a company, and placed in the defendant's hands to float. W. sold out all of his interest in the latter company, and received back all that he had paid. The defendant then made a settlement with the other four plaintiffs, in which he represented the "Lord Byron" and "Anthony Trollope" as costing, respectively, £800 and £1200, and, on that footing, paid to each of the four plaintiffs his share of the speculations. In reality, the defendant paid only £400 for the "Lord Byron," and £600 for the "Anthony Trollope," and the difference was, therefore, fraudulently retained by him. On a motion for a non-suit: *Held* (*Hargrave, J., diss.*), that the action would not lie. *Held* (*per Martin, C.J.*), that the plaintiffs were not entitled to join in the action, as there was no joint contract or joint consideration, and it was known how much each was entitled to receive from the defendant. *Held* (*per Hargrave, J.*), that the action was properly brought jointly, as the plaintiffs, or those whom they represented, were all jointly interested, and because they were all jointly defrauded, and by the false representation of the defendant. *Held* (*per Faucett, J.*)—(1.) That the defendant held the moneys in question in a joint or partnership account, and that plaintiffs could not sue him until a statement of accounts had been made. (2.) That no such statement of accounts was made between the defendant on the one side and the plaintiffs jointly on the other side, and that, therefore, plaintiffs were not entitled to sue jointly. (3.) That the settlement made with each separately might have entitled each to sue separately for the loss sustained by having his

account falsified, but that that would not entitle the plaintiffs to join in an action in contract. (4.) That the plaintiffs have shown no joint interest in the money claimed. *Moore v. Crickton*, 13 N.S.W.S.C.R. (L.), 105. *Martin, C.J., Hargrave and Faucett, JJ.* (1874). N.S.W.

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## FREEHOLD

**Tailings—Pegging out land on which tailings are deposited—Part of freehold.**—Certain auriferous tailings lying upon a machinery site had been purchased from the owner of the machinery site by a person who afterwards sold them to a mining company. The tailings had been lying on this spot since the year 1877, and the company or its predecessors in title had from time to time removed portions of them. The holder of a miner's right pegged out the land on which the tailings were, fenced it in, and refused to give the company possession of the tailings, claiming them as part of his freehold. In an action brought in the County Court by the company for wrongfully depriving it of the tailings, the judge held that the tailings had become part and parcel of the freehold, and that it was impossible to determine where the freehold began and the tailings ended, and gave judgment for the defendant. *Held*, on appeal, that the County Court judge was wrong, and that the judgment below should be set aside and a new trial ordered. *Wallace Bethanga Mining and Smelting Co. v. Robinson*, A.R., June 4th, 1892. F.C., *Higinbotham, C.J., Holroyd and Hodges, JJ.* V.

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## FREEHOLDER

**Pollution of stream — Action by freeholder for damages.**—*See WATER.*

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## FRONTAGE CLAIM

*See CLAIM.*

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## GOLD

*See AURIFEROUS DEPOSIT; CONTRACT; CONVERSION; CRIMINAL LAW; CROWN; CROWN LANDS; DAMAGES; LEASE; MINE; MINER'S RIGHT; PARTNERSHIP; TAILINGS.*

1. — Doctrine of *per confusionem* — Mixing quartz.]—See *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 8 V.L.R. (E.), 277 (1892). *Attorney-General v. Lansell*, 9 V.L.R. (E.), 172; 10 V.L.R. (E.), 84; 5 A.L.T., 71 (1883-4). V.

2. — Loss while under Government escort — Common carriers—Government not liable as.]—See *Oriental Bank Corporation v. The Queen*, 8 N.S.W.S.C.R. (L.), 171. *Stephen, C.J., Cheeke and Faucett, J.J.* (1869). N.S.W.

3. — "Ore"—7 & 8 Geo. IV. c. 29, sec. 37 — Larceny — Washdirt — Construction.]—Per *Faucett, J.*, at p. 281 :—"If, indeed, I am to be guided or governed by chemical, metallurgical, or, in a wider sense, by scientific writers, I would say that an 'ore' must contain a metal chemically, as contradistinguished from mechanically, combined with some other substances, such as gas, or another metal. . . . But in my opinion the words in the Statute ought to be understood—like the words in any other Statute—in the ordinary popular way in which words are commonly understood. Understood in this way, the word 'ore,' in my opinion, means 'a metal unrefined,' 'a metal in its mineral state,' that is, as taken out of the mine, or, in other words, the 'native compound from which a metal is extracted.' Whether this compound is to be separated or broken up, and the metal extracted from it by chemical or mechanical means is, I think, in the construction of this Statute, immaterial." *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258. *Martin, C.J., Hargrave and Faucett, J.J.* (1874). And see S.C., CRIMINAL LAW.

N.S.W.

4. — Gold—Attaching to amalgam plates—Property in—Custom—Damage to plates.]—Plaintiff, the proprietor of a gold mine, entered into an agreement with defendants, quartz-crushers, to crush the quartz for £25 per week, and it was also agreed that the plaintiff should have the right of removing all amalgam from the batteries. The plaintiff after some time had elapsed, finding some of the gold had attached itself to the plates used in the amalgamating process, claimed a right to remove it, which defendants refused on the grounds that their plates might be injured; and also on the ground that there was a custom that the gold adhering to the plates became the property of the owners of the crushing machine. *Held*, that the gold had always remained the

property of the plaintiff. *Per Windeyer, J.* :—"The plaintiff has the right to get this gold in the best way he can, and if he injures the plates he must compensate the defendants for such injury." *Per Windeyer, J.* :—"Such a custom would be unreasonable." *Per Foster, J.* :—"I offer no opinion as to whether the alleged custom is unreasonable." *Patterson v. Strauss G.M. Co.*, 5 N.S.W.W.N., 154. *Darley, C.J., Windeyer and Foster, J.J.* (1889). N.S.W.

5. —Contract for delivery of ore for smelting purposes—Breach of contract—Measure of damages—Profits of smelter.]—See CONTRACT, 5.

6. —Mineral contents of land—Compensation—Onus probandi—New trial.]—See COMPENSATION, 9.

7. —Reward claim.]—See CLAIM, 29, 30.

8. —Auriferous sands area—Claim—Goldfields Homestead Leases Act 1886 (50 Vic. No. 32), (Q.) —Right to mine in a homestead area—34 Vic. No. 15—38 Vic. No. 11.]—See HOMESTEAD AREA.

9. —Royalty—Neglect to keep accounts.]—See LEASE, 80.

## GOLD COMMISSIONER

See PRACTICE, 284.

## GOLDFIELD

See CROWN LANDS; LEASE.

1. —Regulations—Goldfields not proclaimed—Goldfields Act 1866, secs. 5, 14—Miner's right.]—On a motion to set aside an order made by a justice under sec. 14 of *Goldfields Act* 1866, it was contended for the appellants that sec. 14, under which he acted, applied only to things done, and to land within a proclaimed goldfield. *Per curiam* :—"It is clear from the object and provisions of the Act that it was intended to apply exclusively to proclaimed goldfields, and that the regulations to be made under it cannot be extended to any other." *In re Mahon and party, ex parte Woodward* (13th Dec., 1871), 12 N.S.W.S.C.R. (L.), 139 (n). *Stephen, C.J., and Cheeke, J.* But see *Bacon v. Rebora*, 12 N.S.W.S.C.R. (L.), 134 (1873). N.S.W.

2.—Proclamation of.—Previous application for lease—Goldfields Act 1866, sec. 7.]—See LEASE, 48.

3.—Goldfield—Selection of land in—25 Vic. No. 1, secs. 13, 14, 19—37 Vic. No. 13, secs. 27, 28.]—See CROWN LANDS, 14.

4.—Proclaimed—Trespass—48 Vic. No. 18, sec. 45.]—See CROWN LANDS, 18, 19.

5.—Proclamation of goldfield—Cancellation of lease.]—See LEASE, 76.

## GOLDFIELDS COMMON

See COMMON.

## GOLD MINE

See MINE.

## GOVERNMENT GAZETTE

1.—Time of publication.]—See FORFEITURE, 47.

2.—Mineral lease—Notice of cancellation.]—See LEASE, 53.

## GRANT

See WATER.

1.—Crown grant of freehold reserving precious metals—Rights of freeholder.]—A Crown grantee of land, with an exception and reservation in the grant of all gold and auriferous earth and stone, cannot restrain a stranger from removing gold and auriferous earth and stone from the land, although such stranger may be a trespasser against the Crown. *Garibaldi M. and Crushing Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233. F.C., *Higinbotham, Williams and Holroyd, J.J.* (1884). V.

2.—Road or street—Property in soil of—Presumption of grant *ad medium filum viae*—Crown grant of freehold reserving precious metals—Rights of freeholder.]—A., deriving title from a

Crown grant of a freehold abutting on a street, sought an injunction to restrain B. from mining for gold under the half of that street adjoining A.'s land. The grant to A. expressly excepted and reserved all gold and auriferous stone and earth, and the actual workings of B. were shown to have been confined to such. Injunction refused, as A. showed no title to the auriferous stone and earth. *Per Higinbotham and Williams, J.J.* :—Property in the soil *ad medium filum viae* of a public road or street in Victoria, is not created by virtue merely of a grant by the Crown of land defined as being bounded by a distinctly marked road, and *Davis v. The Queen*, 6 W.W. & A'B. (E.), 106, over-ruled; *Holroyd, J.*, expressing an opinion that that case was wrongly decided, but holding that upon the facts the injunction should be refused. *Ibid.*

V.

3.—Crown grant (Q.)—Reservation of minerals—Royal mine.]—A deed of grant from the Crown reserving all mines of coal and other public rights, without mentioning Royal mines, must be presumed to have reserved Royal mines. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). But see LEASE, 69. Q.

4.—Crown grant—Royal mines.]—Lands granted to a subject in Queensland stand with respect to Royal mines in the same position as land granted to subjects in England. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). But see LEASE, 69. Q.

5.—Crown grant—Reservation of minerals—Royal mine—Prerogative right of Crown to gold—Trespass—Injunction.]—Where Royal mines do not pass under a grant, all that passes is the land, exclusive of the stratum containing the Royal mine, which belongs to the Crown. The reservation of mines is equivalent to the reservation of the stratum of sub-soil containing the minerals, and an injunction will not lie at the suit of the owner of private property to restrain trespassers from removing soil from such a stratum. *Attorney-General v. Morgan* (1891), 1 Ch., 432; *Millar v. Wildish*, 2 W. & W. (E.), 37; *Woolley v. Attorney-General*, 2 App. Cas., 163, followed. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). But see *Plant v. Rollston*, 6 Q.L.J., 98. *Griffith, C.J.* and *Real, J.* (*Harding, J. diss.*), LEASE, 69—over-ruling this case (1894). Q.

6.—Trespass—Gross carelessness as to boundaries—Location of a grant—Part of a defendant's plan treated as an admission—Rejection of other parts of plan.]—See **TRESPASS**.

### GRAVEL

Removal—Damages.]—See **CROWN LANDS**, 25.

### GROUND OF APPEAL

See **PRACTICE (APPEAL)**.

### HABITABLE DWELLING

Residence area—Adjoining allotments—Habitable dwelling.]—See **RESIDENCE AREA**.

### HOMESTEAD AREA

Claim—Goldfields Homestead Leases Act 1886 (50 Vic. No. 32)—Right to mine on a homestead area—34 Vic. No. 15—38 Vic. No. 11.]—A tailings area and an auriferous sands claim may be taken up under the combined provisions of the *Goldfields Act* 1874, and the *Goldfields Homestead Leases Act* 1886, and the mining regulations. *Crisp v. Kent*, 7 Q.L.J., 96. *Chubb, J.* (1896), affirmed by F.C., *Griffith, C.J.*, *Cooper and Real, JJ.*, *Brisbane Courier*, 17th and 18th Dec., 1896. Q.

### HOMESTEAD LEASE

Transfer of goldfields homestead lease—Goldfields Homestead Leases Act 1886 (50 Vic. No. 32), sec. 21.]—Goldfields homestead leases can only be transferred in the manner prescribed by sec. 21 of the *Goldfields Homestead Leases Act* 1886. The provisions of that section are imperative. An instrument purporting to be a transfer of such a lease, but not in the prescribed form, and not entered in the book kept at the Warden's office, passes no interest. *Hutton v. Morris*, 8 Q.L.J. (N.C.), 30. F.C., *Townsville, Cooper and Chubb, JJ.* (1893). Q.

### HUSBAND AND WIFE

See **CROWN LANDS**; **LIEN**; **RESIDENCE AREA**.

1.—Miner's right — Claim — Suit — Married Woman's Property Act (No. 384).]—*Semble*, that a married woman is a person entitled to get a miner's right under the *Mining Statute* 1865 (No. 291), and to take a claim under it. *Quære*, whether the claim would not at once become the property of the husband, and: *Held*, that there is nothing in the Act (No. 291), which would relieve a married woman from the common law necessity of being joined by her husband in all actions relating to such claim. *Foley v. Norton*, 4 V.L.R. (M.), 15. *Molensworth, J.* (1878). V.

2.—Married woman—Mining Act 1874, secs. 14, 18, 78—Regulations 105, 106, 124 of December, 1875—Separate use.]—A married woman may be registered as the owner of a share in a mining claim, though Regulation 124 forbids females to work in the mine. She may acquire or hold such share to her separate use. *Rue v. Harris*, 3 N.S.W.L.R. (L.), 148. *Martin, C.J.*, and *Faucett, J.* (1882). N.S.W.

### ILLEGAL OCCUPATION

Collusion — Warden's order — Registration — Taking possession—Title.]—The Ararat By-laws provide that a claim is to be taken possession of by erecting a post at each corner thereof, and that registration is to be obtained by application to the Mining Registrar, according to a form provided. In August, 1872, S. and party were in possession of a claim which they had not worked in accordance with the by-laws, and which was consequently forfeitable. W. and party, as friends of S. and party, instituted a suit before the Warden to enforce the forfeiture as against S. and party, and obtained an order from the Warden declaring the claim forfeited, and ordering possession of it to be given to W. and party. W. and party lodged a certified copy of the order, but not the application required by the by-law, with the Mining Registrar, who registered them for the claim. There was no by-law enabling the Registrar to register persons as claimholders on a Warden's order, and W. and party did not take possession of the

claim by erecting posts, as required by the by-law. S. and party remained in possession. M. and party sued S. and party and W. and party before the Warden, as being in illegal occupation of the claim on the grounds that the claim was not marked off or registered by W. and party in accordance with the by-laws. The case was heard before the Warden and assessors, and a verdict was found for the defendants and the summons was dismissed. M. and party appealed to the Court of Mines. On case stated for the opinion of the Chief Judge: *Held*—(1.) That there is an appeal from Warden and assessors to the Court of Mines (over-ruling *Reg. v. Brewer*, 4 W.W. & A'B. [L.], 124). (2.) That W. and party's proceedings to recover the land were collusive. (3.) That a collusive recovery for forfeiture does not constitute a new title to the land. (4.) That allowing it to be so recovered is an abandonment of the title of the previous holders as between them and the mining public. (5.) That marking and registering the claim in accordance with the by-law was necessary to give W. and party a title; the Warden's order was not enough. The order of forfeiture merely clears away the old title and authorises possession under miners' rights. (6.) That M. and party were entitled to be put in possession. *Moore v. White*, 4 A.J.R., 17. *Molenvorth, J.* (1873). V.

## ILLEGALITY

See LEASE, 33.

## INCORPORATION

See COMPANY.

## INFANT

See MINING ACT 1874, 1.

## INFORMATION

See PRACTICE.

## INJUNCTION

See PRACTICE; COMPANY.

## INSOLVENCY

1.—*Insolvency Statute 1871 (No. 379), sec. 73*  
—*Uncertificated insolvent—Miner's right—Trespass.*—An uncertificated insolvent who holds a miner's right may maintain a complaint before a Warden for trespass on a residence area, and his assignee is not a necessary party to such a proceeding. *Madden v. Hetherington*, 3 V.R. (L.), 68, followed. *Fancy v. North Hurdafeld United Co.*, 8 V.L.R. (M.), 5; 3 A.L.T., 89. *Stowell, C.J.* (1882). V.

2.—*Miner's right—Uncertificated insolvent—Does claim lapse on insolvency of miner?*—See MINER'S RIGHT, 36.

3.—*Miner's right—Insolvency—Rights against stranger—Intervention of official assignee after Warden's decision.*—See MINER'S RIGHT, 37.

## INSPECTION

See PRACTICE; PRIVATE PROPERTY; ROAD; TRESPASS.

1.]—*Motion by plaintiffs to restrain defendants from working on plaintiffs' ground, and also to ascertain the extent of the encroachment, if any.* The case made by the plaintiffs was one of hearsay. But as the defendants, by their answer, had not stated in detail what they were actually doing, but made a general assertion that they were not encroaching, and had not stated that any definite injury would result from the inspection, the motion was granted. *Attorney-General and Bonshaw Co. v. Prince of Wales Co.*, A.R., 15th Feb., 1869. V.

2.—*Costs of separate defences by manager and company.*—Where there was ground for suspicion that a bill had been filed by one company against another for encroachment, for an indirect object, viz., to obtain inspection of defendant's mine, and thereby obtain a knowledge of their works for the purpose of inflicting an injury on defendants, a motion on behalf of the plaintiffs



for inspecting the defendant company's mine was refused with costs. Where the company and its manager appeared by separate counsel, and where the manager had no interest distinct from his company, costs given to company but not to manager. *United Hand and Band of Hope Co. v. Winter's Freehold Co. and Morrison*, 3 A.J.R., 59. *Molesworth, J.* (1872). V.

3.—Mining Statute 1865 (No. 291), sec. 163—*Inspection of books of company not party to suit.*—See PRACTICE, 143.

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## INTERPLEADER

See PRACTICE.

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## INTRUSION

See CROWN LANDS ; PRACTICE.

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## IRREGULARITY

See PRACTICE.

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## ISSUES

See PRACTICE ; TRESPASS.

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## JOINT APPLICATION

See FORFEITURE ; PRACTICE.

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## JOINT TAKING UP

See POSSESSION.

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## JOINT TENANTS

See PARTNERSHIP.

## JUDGE

See PRACTICE.

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## JUDICIAL ACT

See PRACTICE.

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## JURISDICTION

See PRACTICE.

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## JUS TERTII

See COMPANY, 200 ; TRESPASS.

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## JUSTICES

See PRACTICE.

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## LACHES

See NEGLIGENCE.

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## LABOUR CONDITIONS

See CLAIM ; FORFEITURE ; LEASE ; PRACTICE, 146.

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## LAND

Title to—Jurisdiction.]—See PRACTICE, 204.

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## LARCENY

See CRIMINAL LAW.

## LATERAL SUPPORT

See POSSESSION.

**Adjoining claimholders—Injunction—Title—Possession—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32).]**—There is nothing in the *Goldfields Act* 1866 (30 Vic. No. 32), rendering the common law right of lateral support inapplicable to lands held for mining purposes. An action is consequently maintainable by an occupant of lands held under the above Act, for mining purposes, against an adjoining occupant for so working and mining on his own land as to interfere with the stability of his neighbour's. On an application for an injunction in such an action to restrain the defendant from continuing or repeating acts calculated to affect injuriously the plaintiff's land, the plaintiff may rely on his possession merely, without showing in what way he has acquired a right to mine under the *Goldfields Act* 1866. *Great Extended Sluicing Co. v. Hales*, Mac., 896. *Chapman, J.* (1871). N.Z.

## LEASE

See ABANDONMENT; CLAIM; CROWN LANDS; FORFEITURE; HOMESTEAD LEASE; LICENSE; MINER'S RIGHT; PRACTICE; NOTICE; TRESPASS; WATER.

**1.—Application for.]**—Where an Order-in-Council of May, 1860, exempted from mining operations, land of which a lease was applied for, and on which the surveyor had affixed his notice: *Held*, that the refusal of the Warden to grant the application for the lease terminated the pendency of the application, and that it was not necessary for holders of miners' rights to wait for the removal of the official pegs before taking possession of the land. *Hookway v. Muirhead*, 1 W. & W. (L.), 107. Banco (1861). V.

**2.—Not a claim.]**—Land held under lease from the Crown is not a claim, and such land was held not to be within the operation of the *Quartz Reef Drainage Act* (No. 153). *Re Clow, ex parte Hewitt*, 2 W. & W. (L.), 160. Banco (1863). V.

**3.—Extent of ownership.]**—No person other than the holder has a right to mine on land held under a mining lease from the Crown. *Harwood*

*v. Coster*, 2 W.W. & A'B. (L.), 163. Banco V. (1865).

**4.—Occupant of ground applied for.]**—Where a person having no legal title, but having a miner's right, is in possession of Crown lands, a lease of which has been applied for by others, the title of the applicants for the lease is in abeyance till the lease is granted. If it is refused the occupier may bring an action against the applicants for encroachment committed during the pendency of the application. *Fahey v. Kohinoor Q.M. Co. Regd.*, 3 W.W. & A'B. (M.), 4. *Molesworth, J.* (1866). V.

**5.—Compliance with regulations.]**—An applicant for a lease, who has summoned others for trespass on the land applied for, under the *Mining Statute* 1865, sec. 37, is bound to prove a compliance with all the regulations in force, respecting such applications. An Order-in-Council requiring the publication of advertisements of the application is not *ultra vires*. *Craig v. Adams*, 3 W.W. & A'B. (M.), 19. *Molesworth, J.* (1866). V.

**6.—Refusal.]**—There is nothing either in the *Mining Statute* 1865, or in the regulations made under it, to bind the Governor to follow the opinion of the Warden as to refusing a lease. *City of Melbourne G.M. Co. Regd. v. Queen and United Hand-in-Hand and Band of Hope G.M. Co. Regd.*, A.R., 25th Oct., 1867. V.

**7.—Discretion of the Crown.]**—The Crown is not in any way bound to grant a lease to an applicant for lease under sec. 24 of the *Mining Statute* 1865. The applicant is only entitled to reasons for refusal. *Hutchins v. Queen and Cricket Reserve Co. Regd.*, A.R., 10th Oct. and 18th Dec., 1867. V.

**8.—Protection—By-law—Forfeiture.]**—An application for a lease is no protection from forfeiture otherwise incurred, either before or after the application, on the ground of abandonment or breach of by-law. The fact of a person being a shareholder or director of an incorporated company does not preclude him from enforcing a forfeiture incurred by such company for breach of by-law. *Smith v. Golden Gate G.M. Co. Regd.*, 5 W.W. & A'B. (M.), 5. *Molesworth, J.* (1868). V.

**9.—Protection—By-law—Forfeiture.]**—Sec. 71 of the *Mining Statute* 1865, conferred upon the

mining boards the power to make by-laws to determine the events on which the title to any claim enjoyed under miners' rights should become forfeited, upon which the Warden should decide, irrespective of the applications for leases, the granting of which is a matter for the discretion of the Government, independent of the Warden. *Perkins v. Hercules G.M. Co. Regd.*, 5 W.W. & A'B. (M.), 48. *Molensworth, J.* (1868). V.

**10.—Grant of lease—Regulations subsequently made—Evidence of forfeiture.]**—Where a lease was granted under Act No. 148, and regulations under the *Mining Statute* 1865 were subsequently made and promulgated, declaring a certain publication in the *Gazette* to be evidence of the forfeiture of a mining lease: *Held*, that such regulations could not operate upon a lease granted under the former Act, and create a new mode of evidence of forfeiture; and that the lease so granted was not subject to regulations afterwards published, so as to make a notice of forfeiture gazetted under them evidence that the lessee had forfeited his lease. *Johnson v. Thomson*, 6 W.W. & A'B. (M.), 18. *Molensworth, J.* (1869). V.

**11.—Power of Governor—Mining Statute 1865, sec. 24—Applicant for lease—Assignee of application—Scire facias—Lease of ground held under miners' rights.]**—Under the *Mining Statute* 1865, the applicant for a lease must be a person or persons, or a corporation. *Semble*, that the Governor has no power to grant a lease to any person but the applicant. He is not warranted in granting a lease to a person or corporation not the applicant against the protest of the applicant—to enter into inquiry whether the applicant has effectually assigned his interest, and grant it to the assignee. He can only refuse the lease altogether. A company intended to be formed and registered under Act No. 228, cannot apply for a lease in the corporate name which it is intended to bear. A lease, granted under sec. 24, of ground occupied by virtue of miners' rights, is invalid, if the consent of such occupants has not been obtained, nor is it valid until set aside by *scire facias*. That writ might be the proper one for the Attorney-General on behalf of the Crown to resort to, but it is not necessary for persons whose title the lease would wrongfully affect, to seek the *fiat* of the Attorney-General to avoid it as contrary to the Act enabling the Governor to make it, especially in order to resist the lessee pro-

ceeding in equity. *Aladdin G.M. Co. Regd. v. Aladdin and Try Again United G.M. Co. Regd.*, 6 W.W. & A'B. (E.), 266. F.C. (1869). V.

**11a.]**—The Crown in Victoria does not possess the same powers as in England to deal with the land, but is limited to the authority bestowed on it by the Legislature. *Ibid.* V.

**12.—Mining on ground applied for—Mining Statute 1865, sec. 37.]**—Under the *Mining Statute* 1865, sec. 37, an application for a lease entitles the applicant to prevent other people mining on the ground applied for, but does not authorise him to mine on the land himself. If he does mine he is an unauthorised trespasser on public property. *Attorney-General v. Sanderson*, N.C., 60; A.R., 27th Nov., 1869. V.

**13.—Application for lease—Act No. 291, sec. 37—Forfeiture—Trespass—Assignees.]**—Trespass can be maintained under the provisions of sec. 37 of the *Mining Statute* 1865 (No. 291), by an applicant for a gold mining lease, against a person who was not previously in lawful occupation of the land applied for, who, after the date of the application for such lease, obtained as against the applicant a Warden's adjudication of forfeiture as a claim, of the land, the subject matter of the application for a lease, and purported to enter upon the land under such adjudication and continued thereon actually working. Persons taking up claims on a forfeiture are not assignees of the persons whose interests are forfeited. "This clause (Act No. 291, sec. 37), restricts the right which persons would otherwise have to take up after an application for a lease, and makes them provisionally trespassers subject to the fate of the application, and, I think, by necessary implication subjects them to have their titles, whatever they may be, defeated by the lease."—*Per Molensworth, J. Rendall v. Hadley*, 2 V.R. (M.), 21; 2 A.J.R., 105 (1871). V.

**14.—Trustees—Purchaser under sheriff's sale.]**—Three persons, P., M., and H., partners in a mine, in September, 1869, formed a company under the Act No. 228. A lease of the ground—the subject of the company's operations—was applied for and obtained in their three names, on the 11th April, 1870. The company worked on the ground. R. obtained a judgment against the company, and bought, at a sheriff's sale, under the execution, the interest of the company in the lease. R. instituted a suit in equity to

have the lessees, P., M., and H. declared trustees for him. *Held*, that P., M., and H. were trustees for the plaintiff, and that the defendants should transfer the lease to him. *Randall v. Maw*, 2 A.J.R., 103. *Molesworth, J.* (1871).

V.

15.—Act No. 291, secs. 43, 45—Regulations *ultra vires*—Estoppel—Act No. 301, sec. 49—Certificate of title—Entry without legal process.]—Under the *Mining Statute* (No. 291), secs. 43 and 45, the Governor-in-Council fixed a form of lease, gazetted 6th March, 1868, containing amongst other covenants, the following:—"If there shall be a breach of the covenants and provisions herein contained on the part of the lessee, his executors, administrators or assigns, then these presents shall be voidable at the will of the Governor-in-Council and in case the Governor-in-Council shall by writing under his hand declare these presents void the said term shall cease both at law and in equity, and such declaration shall be conclusive evidence in all Courts of law and other jurisdictions sufficient to sustain such declaration having been committed," and a further covenant, enabling the Crown to enter and expel and plead leave and license in case of proceeding thereon. *Held*—(1.) That the first mentioned covenant was not repugnant to the estate conveyed, and that there was no illegal or unusual object in such a provision. (2.) Although such a covenant may be *ultra vires*, a lessee accepting and executing such a lease cannot insist that the lease is effectual so as to pass an estate to him, and ineffectual as to providing for its termination. (3.) That the declaration of the Governor-in-Council conclusively as against the lessee determines the lease as to estate, and lessee's rights and liabilities. (4.) That under such provisions the Crown can enter without legal process. (5.) That a certificate of title, obtained by the lessee, under Act No. 301, cannot defeat the right of the Crown to determine the estate (Act No. 301, sec. 49). "It was not, I think, consistent with the policy of this Act (No. 291) to reduce such tenancies (leases) to tenancies at will, or to invest a body not possessed of powers for judicial investigation of facts, with the conclusive determination of facts, which should constitute a forfeiture, and if any legal proceeding could be taken before me to prevent the imposition of such a form of lease as a condition of getting any, I should be inclined to say that

the imposition was *ultra vires*; but as the granting of any lease is perfectly discretionary, it would not be easy to devise such legal proceeding."—*Per Molesworth, J. Matt v. Peel*, 2 V.R. (M.), 27 (1871).

V.

16.—Act No. 291, sec. 24—Regulations of 27th January, 1871—Power of Warden to question validity of Crown lease.]—By leasing regulations 27th January, 1871 (28), it is provided, that in no case shall the applicant for a lease be allowed to execute the lease after the expiration of sixty days from the date of the *Gazette* in which it is notified that the lease is ready for execution, and if not executed within the sixty days it shall be deemed void. F., an applicant, was allowed to execute a lease after the lapse of the sixty days; and some days after the expiration of sixty days, W., the holder of a miner's right, obtained a Warden's summons as against F., to be put in possession of the land applied for, as forfeited. On the hearing of the case before the Warden, F. relied on the lease. On case stated by the Warden for the opinion of the Chief Judge: *Held*—(1.) That the Warden had authority to question the power of the Governor to allow the execution of the lease after the sixty days. (2.) That he had power to declare the lease void and to place the complainant in possession of the ground. (3.) *Semble*, that execution of lease by the Governor operates only by way of escrow, dependent for completion upon the lessee also executing within the terms of the regulations. *Wising v. Finnegan*, 3 A.J.R., 126. *Molesworth, J.* (1872).

V.

17.—Act No. 291, secs. 24, 37—Lease application—Trespass.]—On the 10th August, 1871, M. applied for a lease under Act No. 291, sec. 24. M., in making the application, did not in all respects comply with regulations under sec. 37. On the 1st March, 1872, B. entered upon the land and took it up as a claim under miners' rights. The lease to M. was executed by the Governor on the 28th October, 1872, and executed by M. on the 18th November, 1872. Afterwards M. entered upon the ground and ejected B. B. brought a suit in the Court of Mines against M. for trespass, and the suit was dismissed. On appeal to the Chief Judge: *Held*—(1.) That sec. 37 explains sec. 24, and makes leases valid as against persons taking up claims after the application and before the granting of leases; but it makes them valid as against such persons only

when the application for lease is made in accordance with the regulations. (2.) That B. was entitled to succeed. *Bain v. McColl*, 4 A.J.R., 62. *Molesworth, J.* (1873). V.

18.—Act No. 291, secs. 39, 43—Escrow—Regulations.]—The Act No. 291, sec. 39, relates to waiving objections before the Governor's execution of a lease, not before the lessee's execution. After execution by the Governor, and before execution by the lessee, the lease according to regulations operates by way of escrow. If such regulations are *ultra vires* Act No. 291, sec. 43, the lease is altogether inoperative. *Finnegan v. Wissing*, 4 A.J.R., 65. *Molesworth, J.* (1873). V.

19.—Act No. 291, sec. 24—Trustees—Sheriff's sale.]—The consent of persons equitably interested in a claim to the granting of a lease under Act No. 291, sec. 24, is not necessary, though a trustee consenting in fraud of those interested might be a ground for equitable interference. A purchaser at a sheriff's sale of all the property of a company would be entitled to a lease granted subsequently to the purchase to a person who applied for it as trustee for the company before the purchase. *Australian G.M. Co. v. Wilson*, 4 A.J.R., 63. *Molesworth, J.* (1873). V.

20.—Claim—Expiry of lease—Trespass—Evidence.]—All holders of miners' rights are equally entitled to take possession when a lease expires, therefore the marking out of a claim prior to the expiry of a lease confers no title, although the miner marking it out is and remains in possession; and the defendant in a complaint for trespassing on a claim so marked out, may show that at the time of such marking out, a third party had a lease of the ground, and put the lease in evidence to show the invalidity of the title on which the complainant relies. *Cooper v. White*, 4 V.L.R. (M.), 12. *Molesworth, J.* (1878). V.

21.—Default in proceeding—Service—Occupant—Act No. 446, sec. 4—Onus probandi.]—When an applicant for a lease omits to serve notice on occupants of ground applied for, as required by regulations, this is a "default" within the meaning of Act No. 446, sec. 4. The onus of proof of service is upon the applicant, and: *Semle*, he must at least show that the notice reached the party intended to be served. *Barton v. Band of Hope and Albion Consols*, 5 V.L.R. (M.), 47. *Molesworth, J.* (1879). V.

22.—Legal process—Creek—Reservation.]—A creek, with liberty of full and free access thereto, was reserved in a lease of land including it. The holder of a miner's right took up a portion of the creek as an alluvial claim. *Held*, that the miner's right occupation was illegal, not being based on any legal proceeding. *Walhalla G.M. Co. v. Jennings*, 1 V.L.R. (M.), 12. *Molesworth, J.* (1875). V.

23.—Act No. 291, sec. 24—Certificate of title.]—A lease under Act No. 291, sec. 24, is not effectual against the holders of miners' rights in possession of the land leased; and a certificate of title under the *Transfer of Land Statute*, of the land so leased to the lessee, purporting only to grant the "land," does not include the "mine" or "claim" held under miners' rights at the date of the lease, but only the surface above such mine or claim. *Munro v. Sutherland*, 5 A.J.R., 139. *Banco* (1874). V.

24.—Act No. 291, sec. 24—Occupation license—Act No. 360, sec. 31—Act No. 237, sec. 42.]—The A. Company obtained under Act No. 291 a gold mining lease. At the time the lease was granted D. was a licensee of a portion of the land under Act No. 237, sec. 42, and had applied to purchase the fee under Act No. 360, sec. 31, and subsequent to the gold mining lease obtained a grant of the land in fee. D.'s assigns proceeded to mine on their land. On motion for injunction to restrain them by the A. Company: *Held*, that the lease gave a valid title to the gold mine, and the grant gave a valid title to all except the gold mine. Motion allowed. *Quare*, as to right to the surface. *Alma Consols Co. v. Alma Extended Co.*, 4 A.J.R., 190. F.C. (1873). V.

25.—Private property—Highway.]—A gold mining lease issued under Act No. 291, sec. 24, included a highway bounded by land which had been alienated prior to the lease. *Held*, that the lease did not authorise the holders to mine under the half of the road abutting on the private property. *Shamrock Co. v. Farnsworth*, 2 V.L.R. (E.), 165. *Molesworth, J.* (1876). V.

26.—Termination by effluxion of time—Miners' rights.]—When a gold mining lease has expired by effluxion of time the receipt of rent by the Crown does not give the lessee any new interest, and the fact of the termination of the lease entitles the holders of miners' rights to take possession, although the lessee may be then in

possession. *Critchley v. Graham*, 2 W. & W. (L.), 211, applies to cases where the interest terminates by forfeiture or abandonment, not by effluxion of time. The Crown cannot grant reversionary leases. *Durant v. Jackson*, 1 V.L.R. (M.), 6. *Molesworth, J.* (1875). V.

**27.—Forfeiture—Application for lease by informant—Marking out—Mining Statute 1865 (No. 291), sec. 43.]**—Where, under Regulation 44 of 23rd January, 1871, a holder of a miner's right applies to the Minister of Mines, seeking a declaration of forfeiture of a lease, and the issue of a new lease to himself, it is not necessary for him to mark out the land. The expectation of obtaining a lease does not justify the person applying for it in mining on the land, as against another person who has marked out the land and applied for a lease. *Robertson v. Morris*, 7 V.L.R. (M.), 1; 2 A.L.T., 109. *Molesworth, J.* (1881). V.

**28.—Labour covenants—Consideration.]—Per Higinbotham, J.:**—The labour covenants in a gold mining lease are the real consideration for the lease, and should be strictly construed. *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.), 70, 78, 79; 3 A.L.T., 68 (1881). V.

**29.—Mining Statute 1865 (No. 291), secs. 42, 43, 45 — Breach of condition — Declaration of forfeiture — Re-entry by Crown — Possession — Suit for encroachment—Parties.]**—Where a gold mining lease contained a proviso that if there should be breaches of the covenants the lease should be voidable at the will of the Governor-in-Council, and in case the Governor-in-Council should, by writing under his hand, declare the lease void, the term should cease and determine both at law and in equity, and it should thereupon be lawful for Her Majesty to re-enter upon the land comprised in the lease: *Held, per Higinbotham, J.*, and upheld by the majority of the Full Court, *Stawell, C.J.*, and *Molesworth, J.* (*Williams, J., diss.*), that where there had been breaches of the lease, and a declaration of forfeiture by the Governor-in-Council, but no re-entry by the Crown, the lessee could maintain a suit against a trespasser to restrain trespass, and for an account of the gold removed by him, and that it was not necessary to join the Attorney-General as a party. But, *per Williams, J.*, that as soon as the declaration of forfeiture was made the lease was entirely at an end, and no further act on the part of the Crown was

necessary to terminate it; that the plaintiff's title to the gold was gone, and that he could not maintain a suit against any person removing gold from the land. *Barwick v. Duchess of Edinburgh Co.*, 8 V.L.R. (E.), 70; 3 A.L.T., 68, 121 (1881-2). V.

**30.—Mining Amendment Act 1872 (No. 446), secs. 3, 4—Leasing Regulations 1871, clause 4, sub-sec. E.—Deposit—Survey of interior lines—Default.]**—Non-payment under Clause 4, sub-sec. E., of the Leasing Regulations 1871, within seven days prior to the making an application for a lease, of a sum to cover the cost of surveying interior lines, and the connection to the nearest fixed point, is a default in proceeding with an application for a lease within sec. 4 of the *Mining Amendment Act 1872* (No. 446). *Great Northern Co. v. Brown*, 8 V.L.R. (M.), 1; 3 A.L.T., 89. *Stawell, C.J.* (1882). V.

**31.—Application—Marking out—Priority.]**—The priority between one person marking out for a lease, and another marking out for a claim, dates as to the former from the time when he has fully complied with the regulations as to painting, &c., the posts. *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth, J.* (1882). V.

**32.—Application—Marking out—Compliance with regulations.]**—Where an intending applicant for a mining lease put in posts on the 18th February, but did not paint them white or put on plates, as required by the Leasing Regulations, until the 21st: *Held*, that this marking out only dated from the 21st. *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth, J.* (1882). V.

**33.—Gold mining on private property—Illegality—Pleading.]**—In an action for breach of the covenants of a lease granted by the owner of land for the purpose of mining for gold on such land, a plea that such contract is illegal, as being for the purpose of taking gold which belongs to the Crown, must negative every hypothesis which would render such a contract legal. *Clarke v. Pitcher*, 9 V.L.R. (L.), 128; 5 A.L.T., 17. *Stawell, C.J.*, *Williams* and *Holroyd, JJ.* (1883). V.

**34.—Mining Statute Amendment Act 1872 (No. 446), secs. 3, 4—Marking out claim pending application for lease.]**—Where land has been marked out for a lease by A., whose application

was subsequently refused, and pending the application B. marked it out for a claim: *Held*, that a stranger to A. could take advantage of this irregularity on the part of B. under secs. 3 and 4 of the *Mining Statute Amendment Act 1872* (No. 446). *Weddell v. Howse*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1883). V.

**35.—Mining Statute 1865 (No. 291), secs. 16, 37—Leasing Regulations, 27th January, 1871, clause 4 (d)—Mining claim under public street—Permit to mine—Application for lease—Notice—Person in occupation.]**—The holder of a miner's right who marks out portion of a street as a claim, and then applies to the body having its management for a permit to mine under sec. 16 of the *Mining Statute 1865* (No. 291), is a person in lawful occupation of the land, and as such is entitled under the *Leasing Regulations* of 27th January, 1871, clause 4, sub-sec. (d), to notice of an application by a person who after the permit is applied for, but before it is granted, marks out the land and applies for a mining lease. *Holmes v. Reynolds*, 11 V.L.R., 711. *Molesworth, J.* (1885). V.

**36.—Notice by applicant for lease—Default—Amending Mines Statute 1872 (No. 446), sec. 4.]**—The omission by the applicant for a miner's lease to give notice to a person holding a permit to mine under a street forming portion of the land applied for is a default in the application within the meaning of sec. 4 of the *Amending Mines Statute 1872* (No. 446). *Holmes v. Reynolds*, 11 V.L.R., 711. *Molesworth, J.* (1885). V.

**37.—Mining on Private Property Act 1884 (No. 796), secs. 4, 31—Leases granted under Act—Right of renewal—Compensation.]**—All mining leases granted in pursuance of the provisions of the *Mining on Private Property Act 1884* (No. 796) carry with them the right of renewal under sec. 31, and the Warden has power to determine the amount of compensation in the case of a proposed renewal of a lease granted under sec. 4. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

**38.—Lease granted to manager of company—Death of manager before execution—Lease void—Summons for illegal occupation of Crown lands—Parties.]**—After the grant of a mining lease of Crown lands to the manager of a mining company, and before he had executed it, he died,

and thereupon application was made to the Secretary for Mines by his successor for permission to execute the lease in his stead. Such permission was not granted within sixty days after the *Gazette* notice that the lease was ready for execution. Proceedings were then taken before the Warden by holders of miners' rights to be put in possession of the ground as illegally occupied by the company. *Held*, that the lease was to be deemed void under the *Mining Regulations* of 23rd January, 1871 (*Government Gazette*, 27 January, 1871), Regulation 28, and that the Warden might so regard it, and that there was no legal or equitable interest in the representatives of the lessee to make them necessary parties. *Forrester v. Great Western Long Tunnel G.M. Co.*, 13 V.L.R., 381; 8 A.L.T., 177. *Webb, J.* (1887). V.

**39.—Mining Statute 1865 (No. 291), secs. 101, 177, 195—Non-compliance with labour covenants—Warden's jurisdiction to make declaratory order.]**—A Warden has no jurisdiction to make a merely declaratory order that the holder of a mining lease has not complied with the labour covenants contained in it. *Ives v. Lalor*, 13 V.L.R., 941; 9 A.L.T., 98. *Webb, J.* (1887). V.

**40.—Non-compliance with labour covenants—Forfeiture.]**—A holder of a miner's right cannot maintain proceedings to obtain possession of land held under a gold mining lease, as upon an alleged forfeiture for breach of the labour covenants, until the lease has been by the Governor-in-Council declared forfeited. *M'Millan v. Dillon*, 6 V.L.R. (M.), 15 (see *FORFEITURE*, 45), explained. *Ives v. Lalor*, 13 V.L.R., 941; 9 A.L.T., 98. *Webb, J.* (1887). V.

**41.—Mining Statute 1865 (No. 291), sec. 37—Marking out land for application for lease—Trespass pending such application—Marking out residence area pending application.]**—The provision made by sec. 37 of the *Mining Statute 1865* (No. 291), that when an applicant for a mining lease shall have marked out the land in accordance with that section, an entry upon such land by a person who shall not previously have been in lawful occupation thereof shall be deemed a trespass, does not mean a trespass against the whole world, but only against the applicant for the lease, and the marking out of a residence area pending the application for a lease of the same land is not illegal and useless

except as against the applicant for the lease if the lease be ultimately granted. *Gorman v. McLellan*, 14 V.L.R., 674; 10 A.L.T., 51. *Holroyd, J.* (1888). V.

42.—Mining Statute 1865 (No. 291), sec. 37—Mining Amendment Statute 1872 (No. 446), secs. 3, 4—Application for lease—Pendency of application—Marking out claim—Default in application for lease—Taking possession.]—The effect of secs. 3 and 4 of the *Amending Mining Statute* (No. 446), is to place a limitation upon sec. 37 of the *Mining Statute* 1865 (No. 291), and after an application for a mining lease has been made and before the Governor-in-Council has dealt with it, if the applicant has made default in proceeding with his application in accordance with the regulations, the holder of a miner's right may now, without going before a Warden, mark out the ground for a claim, and go upon the land and work, although the applicant for a lease be in actual possession of the ground and working it; and if prevented by the applicant for a lease from working thereon, may bring an action of trespass against him, and that although the claim has been registered, and the registration be invalid. *Critchley v. Graham*, 2 W. & W. (L.), 211, distinguished, as applying only to cases where the person in possession has a strong *prima facie* title. *Antony v. Dillon*, 15 V.L.R., 240; 10 A.L.T., 231. *Hodges, J.* (1889). V.

43.—Mines Act 1890 (No. 1120), secs. 301, 303—Mining on private property—Lease from owner of land—Lease from Crown—Right of owner under original lease—Trespass.]—An owner of land granted a lease in 1881 for mining purposes for a period of twenty-one years, prior to the passing of the *Mining on Private Property Act* 1884 (No. 796), [*Mines Act* 1890 (No. 1120)]. The lessee, in 1885, obtained a Crown lease under the Act No. 796, for the term of eleven years. By sec. 11 of the Act No. 796, it is provided that the granting of the Crown lease "shall not as between the parties to any such lease" (referring to private leases not under the Act) "interfere with any of the provisions of the said lease." The lessee committed breaches of covenants contained in the lease of 1881, and the owner therefore determined that lease and re-entered pursuant to the powers therein given. The lessee subsequently, during the existence of the Crown lease, came upon the land and removed certain machinery. The owner then brought an

action for trespass against the lessee. *Held*, that the plaintiff was entitled to recover notwithstanding that the term of the Crown lease had not expired. *Carroll v. Wooldridge*, 18 V.L.R., 363; 13 A.L.T., 151. F.C., *Higinbotham, C.J.*, *a'Beckett* and *Hood, J.J.* (affirming *Hodges, J.*), (1891-2). V.

44.—Mines Act 1890 No. 2 (No. 1202), secs. 4, 5, 6, 7, 8, 9—Mines Act 1891 No. 2 (No. 1251), secs. 5, 6, 19—Applicant for mineral lease—Right to have compensation determined.]—An applicant for a lease under sec. 5 of the *Mines Act* 1891 No. 2 (No. 1251), not being the holder of a lease, is entitled to proceed by complaint to have the amount of compensation for surface damage determined in the manner provided by secs. 6, 7 and 8 of the *Mines Act* 1890 No. 2 (No. 1202). *Bellamy v. Hopkins*, 19 V.L.R., 34; 14 A.L.T., 238. *Hodges, J.* (1893). V.

45.—Mines Act 1890 (No. 1120), secs. 216, 336—Jurisdiction of Warden—Mining on private property.]—The Warden has jurisdiction to deal with leases for mining on private land. *Hawthorn v. Henderson*, 15 A.L.T., 83. *Hood, J.* (1893). V.

46.—Mines Act 1890 No. 2 (No. 1202), secs. 6, 7, 8—Mines Act 1891 No. 2 (No. 1251), sec. 5—Applicant for lease—Right to have compensation determined.]—An applicant for a lease under sec. 5 of the *Mines Act* 1891 No. 2 (No. 1251), is entitled to proceed by complaint to have the amount of compensation for surface damage ascertained in the manner provided by secs. 6, 7 and 8 of the *Mines Act* 1890 No. 2 (No. 1202). *Bellamy v. Hopkins*, 19 V.L.R., 34, approved. *Moe Coal M. Co. Ltd. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C., *Madden, C.J.*, *Holroyd* and *Hodges, J.J.* (1894). V.

47.—Mines Act 1890 (No. 1120), sec. 65—Marking out land for lease—Compliance with regulations—Trespass.]—A regulation required that, prior to application for a lease, the applicant should erect on the land applied for posts, painted white, of a certain height, to define accurately the boundaries and angles, with a metal plate, having painted thereon the words "applied for lease," and the name of the applicant, or if more than two, the first two applicants, legibly painted thereon. In a case where there were three applicants, and the name of only one appeared, the posts being saplings, and not painted white



until after the defendants, in an action for trespass, had marked out a claim over the same land: *Held*, that there had not been a substantial compliance with the regulation, and that an action for trespass would not lie. *Allison v. Sharp*, 17 A.L.T., 240; 2 A.L.R., 50. *a'Beckett, J.* (1896). V.

48.—**Lease—Application for—Subsequent proclamation of goldfield—Goldfields Act 1866, sec. 7.]—**B. and L., each the holder of a "miner's right," pegged out, and under sec. 7 of the *Goldfields Act 1866*, applied for a lease of 4 acres of land, situated on the Lombardy Reef, Solferino, on the 19th February, 1872; the application was received, and rent was paid in accordance with the Act. On the 16th April, 1872, the "Solferino Goldfield" was proclaimed; and on the 22nd April, R. and party, each the holder of a "miner's right," took up as a "claim," under the *Goldfields Act*, portion of the same block of land. Thereupon cross-actions of trespass were commenced. *Held*, that the power given by sec. 7 of the *Goldfields Act 1866* to grant leases extends over all Crown lands, whether within a proclaimed goldfield or not, so far as the Crown Lands Acts do not prevent it. *Held*, also, that the person who first takes up auriferous Crown lands, and applies for a lease in accordance with the Act and regulations, acquires a right which cannot be taken away by the place being subsequently proclaimed as a goldfield. *Ex parte Woodward* (13th December, 1871), and *ex parte Redman* (June, 1867), commented on and distinguished. *Bacon v. Reboru*, 12 N.S.W.S.C.R. (L.), 134 (1873). *Tornaghi v. Bacon*, 12 N.S.W.S.C.R. (L.), 144. *Stephen, C.J., Hargrave and Faucett, JJ.* (1873). N.S.W.

49.—**Crown Lands Acts—What constitutes a lease—"Land under lease for mining purposes"—Mining Act 1874, sec. 56, sub-sec. 5—Alienation Act 1861, sec. 13.]—**Defendant proved that on 27th May, 1881, he made an application for a mineral lease, but he did not state in his application the term for which he required the lease. On 9th May, 1882, the Governor-in-Council approved of the granting of certain leases mentioned in a schedule, which contained the plaintiff's name as an applicant, and which stated that the lease was to be for twenty years. On 2nd June, 1882, the lease was executed by the Governor, and on 24th July it was executed by the defendant. *Held, per Martin, C.J., and*

*Windeyer, J.*, that in order to exclude land from selection under sec. 13 of the *Alienation Act 1861*, on the ground that it is under lease for mining purposes, it is necessary that an actual lease of the land in question should be in existence, and that in issuing such lease the requirements of the *Mining Act* should in all respects be complied with, both by the Governor and the applicant; and, therefore, no lease having issued to the defendant at the time of plaintiff's selection, such selection was valid. *Held also, per totam curiam*, that as the applicant had not applied for a lease for any fixed period, and had not assented to the act of the Governor-in-Council approving the granting of a lease for twenty years, what took place did not amount to a binding contract between the Governor and the applicant considering them as private individuals. *King v. McIvor*, 4 N.S.W.L.R. (L.), 43. *Martin, C.J., Windeyer and Innes, JJ.* (1882-3). And see S.C., CROWN LANDS. N.S.W.

50.—**Mineral lease—Approval of Governor—Tenancy from year to year.]—**There was no creation of a tenancy from year to year on the facts of this case. *King v. McIvor*, 4 N.S.W.L.R. (L.), 43, at pp. 48, 51, 52 (1882-3). See CROWN LANDS, 13. N.S.W.

51.—**Mineral lease—Intending applicant for—Entry on Crown lands for the purpose of marking boundaries—Mining Act (37 Vic. No. 13), sec. 56, sub-sec. 3.]—**Trespass to plaintiff's land. Plea, that the said land was Crown lands, and that the defendant was the intending applicant for a mineral lease of the said land, and that he marked the corners of the said land, and cut trenches to indicate the general directions of the boundary lines, in accordance with the provisions of the *Mining Act* and regulations thereunder, which are the alleged trespasses. Demurrer. *Held*, that the plea was good. A person has a right to enter Crown lands for the purpose of marking the boundaries prior to making an application for a mineral lease of the same. *Green v. Horn*, 6 N.S.W.L.R. (L.), 87; 1 W.N., 149. *Martin, C.J., Faucett and Innes, JJ.* (1885). N.S.W.

52.—**Mineral lease—Entry by applicant on Crown lands for marking boundaries—Failure to follow out his preliminary acts by sending in application.]—***Per Martin, C.J.*, at p. 89:—"It is said that . . . he should have immediately followed up his act by sending in his

application, and that he should have set out such fact in his plea. . . . The 5th Regulation is a complete answer, sufficient to justify a person in making any number of marks before applying for a lease." *Per Innes, J.*, at p. 90:—"Whether a failure by a *bond fide* intending applicant to follow out his preliminary acts by making an application for a lease would make him a trespasser *ab initio*, I express no opinion. Such non-performance would be strong evidence that the entry was not *bond fide*." *Green v. Horn*, 6 N.S.W.L.R. (L.), 87; 1 W.N., 149. *Martin, C.J.*, *Faucett and Innes, JJ.* (1885). N.S.W.

**53.—Mineral lease—Mining Act 1874, sec. 40—Regulations (mineral leases) 28, 34, 35, 48—Applicant failing to execute leases—Cancellation.]—**A mineral lease, where the applicant fails to execute it, in accordance with Regulations 34 and 35, becomes absolutely cancelled, and such applicant's rights cease, although notice of such cancellation is not published in the *Government Gazette*. *King v. McIvor*, 4 N.S.W.L.R. (L.), 43, followed. *Hitchins v. Twose*, 9 N.S.W.L.R. (L.), 81; 4 W.N., 180. *Darley, C.J.*, *Windeyer and Foster, JJ.* (1888). N.S.W.

**54.—Land pegged out—Boundaries—Application.]—**On April 12th, 1887, S. applied for a gold mining lease of 15 acres, and pegged it out in the regular manner. On April 30th, plaintiff applied for and pegged out a gold mining lease of 10 acres "adjoining S.'s southern boundary." At the beginning of May, S.'s lease was surveyed, when it was discovered that his pegs included an area of 19 acres, and consequently the southern boundary was shifted back so as to make the lease contain 15 acres only, and on 9th March, 1888, W. and another applied for a 4 acre quartz claim, including land between S.'s surveyed boundary and the northern boundary of B.'s 10 acres. Plaintiff lodged a complaint with Warden, who directed the registration of W.'s quartz claim. Plaintiff appealed to District Court, which upheld Warden's decision. *Held*, that only the land pegged out by the applicant is protected by an application for a gold mining lease, not the land described in the application by means of boundaries, &c. *Brereton v. Wade*, 5 N.S.W.W.N., 78. *Darley, C.J.*, *Windeyer and Stephen, JJ.* (1889). N.S.W.

**55.—Mining lease—Working mine by "in-stroke" from adjoining mine.]—**Construction of a mining lease, in which the predecessors in title

of the plaintiffs demised to the predecessors in title of the defendants certain "coal mines, coal pits, seams and veins of coal, as well open or unopen, which can, shall or may be wrought, dug, or found, or discovered under all or any of the lands herein described," &c. *Crossman v. South Wallsend Coal Co.*, 7 N.S.W.W.N., 86. *Darley, C.J.*, *Innes and Foster, JJ.* (1890). N.S.W.

**56.—Mineral lease—Crown Lands Act 1884, secs. 4, 101, 102, 133—Mining Act (37 Vic. No. 43), secs. 2, 56—Temporary reserve.]—**Lands temporarily reserved from sale for any purpose under sec. 101 of the *Crown Lands Act 1884*, remain Crown lands which have not been dedicated to any public purpose within the meaning of sec. 133 of the *Crown Lands Act 1884*, and sec. 2 of the *Mining Act*. A mineral lease of part of such temporarily reserved lands may be applied for under sec. 56 of the *Mining Act*, and the applicant may occupy the land applied for pending his application. Dictum in *Ricketson v. Barbour, Knox*, 72, disapproved (1877). *Ex parte Penniment*, 12 N.S.W.L.R. (L.), 68; 7 W.N., 129. *Darley, C.J.*, *Innes and Stephen, JJ.* (1891). N.S.W.

**57.—Mining lease—37 Vic. No. 13, sec. 40—Gold Mining Lease Regulations, 28 and 33—Miner's right—Quartz claim—Trespass—"Until and unless"—Subsequent applicant.]—**Regulation 28 of the Gold Mining Lease Regulations does not operate to prevent the holder of a miner's right from taking up a quartz claim on land in respect of which an application for a gold mining lease is pending. By sec. 40 of the *Mining Act 1874*, he is liable for trespass "until and unless" the lease application is refused; but on the refusal of such lease application, his possession is good against any subsequent applicant for a lease of the same land. *Per Backhouse, D.C.J.*, at p. 102:—"In Victoria the law has been altered" (since *Barker's G.M. Co. v. Keating*, 1 V.R. (M.), 18 which was approved by the judge) "by Act No. 446, from sec. 3 of which our Regulation 28 was framed. But in order to effect a similar change in the law here, a legislative enactment would be necessary." *Frazer v. Hartley*, 7 N.S.W.W.N., 101. *Backhouse, D.C.J.* (1891). N.S.W.

**58.—Contract—Construction of—Sale of mining lease—Payment when company formed.]—**A contract for the sale of a mining lease acknow-

ledged the payment of £50, and provided that the balance should be paid when a company was formed and satisfactorily in existence. *Held*, under the circumstances of the case, that "company" did not mean a registered company. *Vitnell v. Simpson*, 9 N.S.W. W.N., 45. *Darley, C.J., Innes and Stephen, JJ.* (1892). N.S.W.

**59.—Mineral lease—Marking out—Mineral Lease Regulation 2.]**—Plaintiff had marked out a mineral lease on the 12th April, 1892, and did not complete the marking out until twenty-five minutes past three. At forty-five minutes past two, his application was lodged at the Warden's office. *Held*, that the marking out of an intended mineral lease must, under Regulation 2 of the Mineral Lease Regulations 1885, be completed before the application for the lease is lodged. *Duncan v. Fullerton*, 14 N.S.W. L.R. (L.), 308; 10 W.N., 33. *Windeyer and Foster, JJ.* (1893). N.S.W.

**60.—Mineral lease—Marking out—Mineral Lease Regulations—Object of—46 Vic. No. 7, sec. 1.]**—"The object of the Regulations in requiring this complete marking out of the land is plainly to prevent the interminable and complicated disputes which must otherwise arise, and to enable persons to know with certainty what land is available for them to take up." *Duncan v. Fullerton*, 14 N.S.W. L.R. (L.), 308; 10 W.N., 33. *Per Windeyer, J.*, at p. 310 (1893). N.S.W.

**61.—Re-entry—Determination of lease under Real Property Act—Real Property Act (26 Vic. No. 9), secs. 51, 52, 53, 111—Equitable titles to land under Real Property Act—Relief from forfeiture—What amounts to de facto possession of a mine—Practice—Amendment.]**—A no-liability gold mining company became, in 1891, the lessees under the *Real Property Act* of land from the defendant. The lease covered all the right, title and interest of the defendant in and to all mines, veins or beds of gold ore situate on or under the land demised, with liberty to dig for and raise gold out of the land for the term of 99 years. By this lease it covenanted that it would daily and duly enter and keep in a book or books, to be kept for that purpose at a proper office on the land thereby demised, a true, particular and complete account in writing of the quantity and value of all gold raised from the said land as far as it should be possible to separate such quantity and value from the quantity and value of minerals

raised from the adjoining premises, and that such book or books should at all reasonable times during each working day be open for the defendant's inspection; and that it would at all times render to the defendant every reasonable assistance in making such inspection; and that it would within the first seven days of the months of January, April, July and October in every year, forward to the defendant and the Secretary for Mines a return setting out the quantity and value of the gold raised during the preceding quarter, together with a statutory declaration verifying such return. . . . And it was provided that if it should not observe and perform all the covenants, conditions and agreements therein contained on its part, it should be lawful for the defendant to enter upon the land demised or any part thereof, and to determine the demise thereby made and the liberties and powers thereby granted. In July, 1892, the defendant made a formal entry, and served on the company a notice that he had done so "in consequence of the lessees having made default in the performance of the covenants or some one or more of them in the lease." In September, 1892, a new company agreed to purchase and take over the property and liability of the old company, and in November, 1892, this lease, among other things, was assigned to the purchasers. The old and new company now proceeded for an injunction to restrain the defendant from further acts of trespass, for an account of minerals removed by him from the land and for damages. No office had been erected on the land; on adjoining land of the lessee there was an office, but no books were kept there. *Held*, that the covenant had been broken both by not keeping the necessary books, and by not erecting an office on the land demised; and that, in consequence of that breach the defendant was entitled to re-enter and take possession of the land. *Held*, also (*per Owen J.*), that the lessor was entitled to determine the lease, at any rate as against the lessee, without taking the statutory steps required by sec. 53 of the *Real Property Act*; the provisions of that section only applying where under the lease the lessor has no power to determine the lease himself. *Held*, also (*per Owen, J.*), that the protection which sec. 111 of the *Real Property Act* affords against notice to a transferee under the Act only applies when the transferee's title has been completed under the Act by the transfer being registered. *Baker's*

*Creek Consolidated G.M. Co. v. Hack*, 15 N.S.W. L.R. (E.), 207; 10 W.N., 217. *Darley, C.J., Manning and Innes, JJ.* (1894). N.S.W.

**62.—Re-entry—Possession.**—“Assuming both parties to have been in actual possession, does not the law conclude his possession to be right-ful who has the legal title?” *Baker’s Creek Consolidated G.M. Co. v. Hack*, 15 N.S.W. L.R. (E.), 207; 10 W.N., 217. *Per Owen, J. (arg.)*, at p. 215, and see p. 226. N.S.W.

**63.—Lessor and lessee—Possession—Under-ground workings—Evidence of possession.**—“I doubt whether the continuation of work under-ground really amounts to a continuation of possession of the land by defendants. . . . It is not as if there had been an open mine on the defendant’s land from which the plaintiff companies had continued their operations; they continued to work from a shaft outside defendant’s land, and he had no means of finding that out, so far as I can see.” *Baker’s Creek Consolidated G.M. Co. v. Hack*, 15 N.S.W. L.R. (E.), 207; 10 W.N., 217. *Per Owen, J.*, at p. 225 (1894). N.S.W.

**64.—Mining lease—Application—Priority—Goldfields Act 1874 (38 Vic. No. 11), sec. 14.**—Applications for leases are entitled to priority according to the date at which they are tendered to the Warden. *Mills v. Day Dawn Block G.M. Co.*, 1 Q.L.J., 98. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1882). Q.

**64a.—Lease (Q.)—Form.**—A demise of a mine in Queensland need not be by deed. It is sufficient if it be in writing. *Ersine v. Bergin*, 1 Q.L.J., 75. *Chubb, D.C.J.* (1882). Q.

[NOTE.—The Act 8 & 9 Vic. c. 106, sec. 3, requiring all leases required by law to be in writing to be by deed has never been adopted by the Queensland legislature.]

**65.—Goldfields Act 1874 (38 Vic. No. 11)—Regulation 81—Applications—Refusal by Minister—Priority.**—In 1879 the plaintiff applied for a lease of certain auriferous land. The application was received and recorded by the Warden. Before the Warden had reported on the application, A. and B., under Regulation 81 of the *Goldfields Act 1874* (38 Vic. No. 11), applied for the cancellation of plaintiff’s application on the ground of non-representation. On 9th April, 1880, the Warden found in favour of

the plaintiff, and on 13th May following recommended to the Minister of Mines that a lease should be issued to plaintiff. On 1st June the Minister rejected plaintiff’s application on the ground of non-representation. On 2nd June plaintiff made a fresh application for a lease of the same and some additional land, but the Warden refused to receive such application. On 5th June defendants, A. and B., made an application for a lease of a large part of the land comprised in plaintiff’s second application, which the Warden received and recorded, and under that application for lease the defendants A. and B. took possession of the land and they and their transferees, the D. Company, occupied and worked it continuously. On 10th May, 1881, a writ of *mandamus* was issued by the Supreme Court to the Warden, commanding him to receive, record and report on plaintiff’s second application, which the Warden accordingly did on 21st May, 1881. On action brought by plaintiff against A., B. and the D. Company for trespass: *Held*, that the plaintiff’s second application had priority over that of A. and B., and that the action was maintainable. *Mills v. Day Dawn Block G.M. Co. Ltd.*, 1 Q.L.J., 98. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1882). Q.

**66.—Crown grant—Reservation of minerals—Royal mine.**—A deed of grant from the Crown reserving all mines of coal and other public rights, without mentioning Royal mines, must be presumed to have reserved Royal mines. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). See 69, *infra*. Q.

**67.—Crown grant—Royal mines.**—Lands granted to a subject in Queensland stand, with respect to Royal mines, in the same position as land granted to subjects in England. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). See 69, *infra*. Q.

**68.—Crown grant—Reservation of minerals—Royal mine—Prerogative right of Crown to gold—Trespass—Injunction.**—Where Royal mines do not pass under a grant, all that passes is the land, exclusive of the stratum containing the Royal mine, which belongs to the Crown. The reservation of mines is equivalent to the reservation of the stratum of subsoil containing the minerals, and an injunction will not lie at the suit of the owner of private property to restrain trespassers from removing soil from such a stratum.

*Attorney-General v. Morgan* (1891), 1 Ch. 432; *Millar v. Wildish*, 2 W. & W. (E.), 37; *Woolley v. Attorney-General*, 2 App. Cas., 163, followed. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). See next case. Q.

69.—*Goldfields Act 1874* (38 Vic. No. 11), secs. 2, 10, 14—*Mining lease—Trespass—Crown lands—Royal mine.*—The plaintiff applied for a mining lease of land situated within the Charters Towers goldfields, which had been granted in fee to other persons. Before the application was granted, the defendant not being the occupier of such lands, by means of a side drive from the adjoining land, entered upon a gold-bearing reef 600 feet under the surface and removed gold therefrom. The plaintiff sued the defendant under sec. 14 of the *Goldfields Act 1874*, for trespass. Held, a Royal mine under land granted in fee is not Crown lands within the meaning of the *Goldfields Act 1874*, and cannot be leased for mining purposes. Held (*Griffith, C.J.* and *Real, J.*), that a grant in fee from the Crown confers upon the grantee possession of a Royal mine lying under the land, that an action is maintainable at his suit against a trespasser working the mine without license or authority from the Crown. *Plant v. Attorney-General*, 5 Q.L.J., 57, over-ruled. *Plant v. Rollston*, 6 Q.L.J., 98. *Griffith, C.J.*, and *Real, J.* (*Harding, J., diss.*), (1894). Q.

70.—*Act No. 5 of 1857—Records—Scire facias—Seal of province.*—Leases of Crown lands issued by virtue of Act No. 5 of 1857, are not *ipso facto* records, although under the great seal of the province, and therefore *scire facias* is not applicable. *Reg. v. Hughes (Moonta Case)*, L.R. 1 P.C., 81; 1 S.A.L.R., 143. Full Court and Privy Council (1864-6). S.A.

71.—*Crown lands—Scire facias—Power of Supreme Court.*—*Semble*, the Supreme Court has power to promulgate a rule that the form and manner of proceeding to repeal leases of Crown lands shall be by *scire facias*. *Ibid.*

S.A.

72.—*Crown grants—Leases under South Australian Act—Scire facias—Record—Supreme Court of South Australia.*—Leases granted by the Governor of South Australia under powers conferred on him by 21 Vic. No. 5, sec. 13, for regulating the sale and other disposal of waste lands belonging to the Crown, sealed with the public seal of the province, but not enrolled

or recorded in any Court, are not in themselves records; and although bad on the face of them, being for a larger quantity of land than allowed by that Act, cannot be annulled or quashed by a writ of *scire facias*. Such writ is a prerogative judicial writ, which must be founded on a record, and cannot under the constitution of the Supreme Court in South Australia issue out of that Court. The proper remedy for an unauthorised possession of lands of the Crown in the colony is by an information in Chancery or writ of intrusion. *The Queen v. Clarke*, 7 Moo. P.C., 77, commented on and explained. *Reg. v. Hughes (Moonta Case)*, L.R. 1 P.C., 81; 35 L.J.P.C., 23; 14 L.T., 808; 14 W.R., 441; 12 Jur. (N.S.), 195; 1 S.A.L.R., 143. J.C., *Lord Chelmsford, Sir J. W. Colvile and Sir E. V. Williams* (1865-6).

S.A.

73.—*Mineral Leases Act 1862—Police rates.*—Under the *Police Act 1863*, holders of mineral leases are liable to payment of police rates. *Yelta M. Co. v. Ford*, 3 S.A.L.R., 46. *Hanson, C.J.*, and *Gwynne, J.* (1869). S.A.

74.—*Mineral Leases Validating Act 1868-9—Pastoral lands—Waste Lands of the Crown.*—*Semble*, the provisions of the *Mineral Leases Validating Act* (No. 11, 1868-9), allowing mineral leases to be granted out of pastoral lands was inserted by the legislature in consequence of the decision in the *Yelta Mining Co. v. Ford* (*supra*), to the effect that pastoral lands were not waste lands of the Crown. *Brown v. McLoughlin*, 4 S.A.L.R., 96, at p. 100 (1870). S.A.

75.—*Grant of agricultural lease by Crown—Previously acquired easement.*—The saving of the rights of the Crown in the *N.Z. Goldfields Act 1862* (26 Vic. No. 21), does not validate an agricultural lease issued by the Crown when it is inconsistent with an easement previously acquired under a miner's right. *Robinson v. Blundell, Mac.*, 683. *Chapman, J.* (1867-8). Cf., *Aladdin G.M. Co. v. Try Again United G.M. Co.*, 6 W.W. & A'B. (E.), 266, *supra*, 11. N.Z.

76.—*Pastoral lease or license—Proclamation of goldfield—Cancellation of lease or license—Time—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 16—Otago Waste Lands Act 1866 (30 Vic. No. 22), sec. 69.*—Sec. 16 of the *Goldfields Act 1866* (30 Vic. No. 32), provides that "when any gold mine or goldfield shall be discovered and proclaimed upon any Crown lands which, at the date of the passing of this Act, shall have been

under license or lease for depasturing purposes, it shall be lawful for the Governor, at his discretion, to cancel the license or lease under which such land *shall have been* held in occupation, &c." *Held*, that the word "when" in this section does not mean "at the time that," but "after the time that," and therefore that the cancellation need not be contemporaneous with the proclamation of the goldfield. That the words "shall have been" may be read as "are," and that when first used they apply to the time of the passing of the Act, and when they occur again they refer to the time of cancellation. Therefore, it was competent for the Superintendent of Otago, as delegate of the Governor in 1867, after proclamation of a goldfield, to cancel a pastoral lease then subsisting which was taken to have been issued in pursuance of the *Otago Waste Lands Act 1866* (30 Vic. No. 22), sec. 69, in exchange for a licence in existence on the 8th October, the day when that Act and the *Goldfields Act* passed and came into operation. *MacAndrew v. MacLean*, 2 N.Z. C.A., 198. *Arney, C.J., Johnston and Richmond, JJ.* (1872), affirmed by J.C., *Sir J. W. Colvile, Sir M. Smith, Sir R. P. Collier, and Sir S. Martin*, 43 L.J.P.C., 69; 2 N.Z.C.A., 233; 1 N.Z.J.R., 178 (1874). N.Z.

77.—Execution—Attestation—Goldfields Act 1866 (30 Vic. No. 32), sec. 41.]—It is not necessary for the validity of a lease under the *Goldfields Act 1866* (30 Vic. No. 32), sec. 41, executed by the Governor's delegate, that the witness to the lease should add his residence and occupation; nor is sealing and delivery necessary. *Costello v. O'Donnell*, N.Z.L.R. 1 C.A., 105. C.A., *Prendergast, C.J., and Richmond, J.* (1882). N.Z.

78.—River bank—Right of road.]—Regulation 18 of the Nelson Goldfields Regulations, providing that "in all cases a public roadway . . . will be reserved along the banks of rivers," does not make the bank of a river a road, nor does it limit the powers of the Crown or the Superintendent in granting leases including the river bank. It is at most directory, and is declaratory only of the principles on which the Superintendent will act in granting leases. A mere water-course is not a river within the meaning of such a provision. *Costello v. O'Donnell*, 2 N.Z.L.R. 1 C.A., 105. C.A., *Prendergast, C.J., and Richmond, J.* (1882). N.Z.

79.—Coal mine—Lease—Subsidence of surface.]—Where a coal mine is worked in accordance with the covenants in the lease, the lessee is not liable for subsidence of the surface consequent on such working. *Brown v. Samson*, 8 N.Z.L.R., 284. *Williams, J.* (1889-90). N.Z.

80.—Covenant in lease to keep accounts—Royalty—Coal mine—Omission to keep accounts—Presumption.]—Where a lessee, in violation of his covenants in that behalf, neglects to keep data showing for what coal he is liable to pay royalty, and mixes up different classes of coal so as to render it difficult to prove for how much he is liable to pay royalty, the Court will presume against him, and will not, in assessing the amount, pare it down too carefully. *Brown v. Samson*, 8 N.Z.L.R., 284. *Williams, J.* (1889-90). N.Z.

81.—Tail-race—Severance of wash-dirt from soil—Removal of by lessee after expiration of lease.]—There is not such a severance from the soil of wash-dirt in a tail-race as to entitle the holder of a mining lease to enter upon the ground and remove it from the tail-race after his lease has expired. *Grayson v. Delaney*, 10 N.Z.L.R., 134. *Williams, J.* (1891). N.Z.

82.—Action for rent.]—Where a lease is authorised by Statute and a statutory rent reserved, payment of such rent may be enforced against a lessee by action, although the lease does not contain a covenant to pay rent; and where in such case no condition is broken other than a condition to pay rent, a plea of liability to forfeiture cannot be set up. *Commissioner of Crown Lands (Otago District) v. Guffie; Same v. Grayson*, 11 N.Z.L.R., 187. *Williams, J.* (1892). N.Z.

83.—Mortgagee in possession—Forfeiture—Injury to mortgaged premises.]—See MORTGAGE, 8.

84.—Forfeiture—Jurisdiction of Warden—Mining Statute 1865, secs. 3, 45, 71 (vil.), 101, 177.]—See FORFEITURE, 45.

85.—Residence area—Trespass—Mining Statute 1865, secs. 5, 24.]—See RESIDENCE AREA, 8.

86.—Mining Companies Act 1871 (No. 409), sec. 131—Letting of mine on tribute.]—See COMPANY, 273, 274.

87.—Continuing forfeiture—Receipt of rent—Waiver.]—See FORFEITURE, 46.

88.—Forfeiture—Re-entry by Crown.]—See FORFEITURE, 49.

89.—Mines Act 1890 (No. 1120), sec. 65—Marking out lease—Trivial departure from regulations—Trespass.]—See TRESPASS, 35.

90.—Agreement to keep mineral leases valid—Partnership for working mineral lands.]—See PARTNERSHIP, 16.

91.—Forfeiture—Crown—Goldfields Act 1886—Regulations.]—See FORFEITURE, 55.

92.—Mineral lease—After application for conditional purchase—Ejectment—Tender of purchase-money to Clerk of Treasury—Crown Lands Act 1861.]—See CROWN LANDS, 10.

93.—Mineral lease—Applied for, but not granted—25 Vic. No. 1, sec. 13—Mining Act 1874, secs. 40, 56.]—See CROWN LANDS, 12.

94.—Leasehold—Holder of—Notice—Evidence—Regulation 95, 29th December, 1875—Ultra vires.]—See MINING ACT 1874.

95.—Mineral lease—Trespass—Mining Act (N.S.W.), Regulation 27.]—See LICENSE, 9.

96.—Lease—To mine land—Pastoral lease—Crown lands—Interpretation.]—See CROWN LANDS, 17.

97.—Goldfields Act (Q.) 1874 (38 Vic. No. 11), secs. 9, 62-64—Regulations 30, 60-72—Miner's right—Water rights—Gold mining lease—Right to subsoil.]—See WATER, 13.

98.—Forfeiture—Action to set aside—Parties—Proper procedure.]—See PRACTICE, 301.

99.—Trespass—Marking out.]—See TRESPASS, 41.

100.—Pastoral lease—Occupation license—Consent of tenant.]—See LICENSE, 21.

101.—Mining Act 1886 (N.Z.), (50 Vic. No. 51), sec. 183—Mining lease—License.]—See LICENSE, 23.

102.—Liens on leases—Right of public to inspect.]—See PRACTICE, 430a.

## LICENSE

See LEASE; NOTICE; PRACTICE (WARDEN); PRIVATE PROPERTY.

1.—Deed.]—An exclusive license to work mines can be effectually granted only by deed. *Osborne v. Elliot*, 6 W.W. & A'B. (M.), 49; N.C., 20; A.R., 14th Sept., 1869. *Molesworth, J.* V.

2.—Business license.]—Where under the Act No. 32, sec. 116, a person was charged with carrying on business on a goldfield without a license, and evidence given that he had carried on business: *Held*, that it was not for the prosecutor to prove that defendant had not a license, but for the defendant to prove that he held one. *M'Cormack v. Murray*, 2 W. & W. (L.), 122. Banco (1863). V.

3.—Mining company—Exclusive license—Tripartite agreement.]—A mining company entered into an agreement with a tributor (in the agreement called "the contractor"), enabling him to mine on their land, and take and remove all gold, &c., therefrom, receiving from the company an amount, as wages, proportionate to the amount of gold he extracted. The agreement provided that the mine and all gold taken therefrom should for all purposes be deemed to be the property of the company, and further that the ground to be worked should be such portions of the company's claim as the mine manager of the company might determine from time to time during the continuance of the agreement. *Held*, that this amounted to an exclusive license to mine on all the land, and that the company could not subsequently grant to another a license to mine in a portion of the same ground. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 81, 187. F.C., *Stawell, C.J.*, *Molesworth and Williams, J.J.* (reversing *Higinbotham, J.*), (1881-2). V.

4.—Water-race license—Notice of transfer.]—Clause 27 of the Regulations, by Order-in-Council of 21st January, 1878, only requires notice of a transfer of a water-race license to be given to the Minister after the transfer is complete and accepted. *Baw Baw Sluicing Co. Ltd. v. Nicholls*, 9 V.L.R. (L.), 208; 5 A.L.T., 73. *Stawell, C.J.*, *Higinbotham and Holroyd, J.J.* (1883). V.

5.—Mining Statute 1865 (No. 291), sec. 5—Agreement for use of road over residence area.]

## LIABILITY

See COMPANY.



—An agreement between A. and B., who was a wood carter, that in consideration of A. allowing B. the use of a road across the residence area of A., that B. would pay A. 2s. 6d. for every load of wood carted over the land, is not an interest in land so as to bring it within the provisions of the *Mining Statute* 1865 (No. 291). Such an agreement is a mere personal license and confers no interest in the land. *Rinaldi v. Milano*, 8 A.L.T., 5. F.C., *Higinbotham, Williams and Holroyd, JJ.* (1886). V.

6.—*Land Act 1890* (No. 1106), sec. 65—*License of auriferous land—Renewal of license.*—Each renewal of a license to use auriferous land granted under sec. 65 of the *Land Act* 1890 (No. 1106), must be regarded as a new license. *Harris v. Gollings*, 17 V.L.R., 686; 13 A.L.T., 100. *Webb, J.* (1891). V.

7.—*Condition of license—Enclosing with good and substantial fence.*—If auriferous land, of which a license under sec. 65 of the *Land Act* 1890 (No. 1106), is granted, is at the time of the grant enclosed with a good and substantial fence, it is no breach of one of the conditions of the license requiring the licensee either to reside on the land, or within four months from the date thereof enclose the same with a good and substantial fence, if the licensee does neither the one nor the other. *Harris v. Gollings*, 17 V.L.R., 686; 13 A.L.T., 100. *Webb, J.* (1891). V.

8.—*Land Act 1890* (No. 1106), sec. 65—*License of auriferous land—Sale of more than twenty acres—Void sale.*—The licensee under sec. 65 of the *Land Act* 1890 (No. 1106), of twenty acres of auriferous land, who was authorised by the licensee under a similar license of a further six acres of such land to sell the same, entered into a contract to sell the twenty-six acres to the defendant, and the contract provided that if any mistake or error were made in the description of the property it should annul the sale, but compensation should be made therefor. *Held*, that the contract being for the conveyance of more than the twenty acres, which amount only the Act permitted any one holder to hold, was void; that it was not a mistake in the description of the property within the meaning of the compensation clause, nor was it a deficiency in area for which compensation might be allowed. *Harris v. Gollings*, 17 V.L.R., 686; 13 A.L.T., 100. *Webb, J.* (1891). V.

9.—*Mineral license—Lease—Trespass—Mining Act, Regulation 27.*—Where defendant applied for and obtained lease of certain lands without entering and marking it out, the Court held that he had no title against plaintiff, who had entered under a mineral license. *Penglass v. Broken Hill Junction North S.M. Co.*, 5 N.S.W.W.N., 85. *Darley, C.J., Windeyer and Stephen, JJ.* (1889). N.S.W.

10.—*Mineral license—Holding more than one license—Mining Act (37 Vic. No. 13)—Mineral License Regulation 5.*—There is nothing in the *Mining Act* (37 Vic. No. 13), to preclude one person from taking out eight mineral licenses in his own name, and by virtue of such licenses taking possession of 320 acres for the purpose of searching for shale. *Anderson v. Pringle*, 13 N.S.W.L.R. (L.), 271; 9 W.N., 101. *Darley, C.J., Windeyer and Stephen, JJ.* (1892). N.S.W.

11.—*Mineral license—Holding more than one license—Mining Act (37 Vic. No. 13), secs. 15, 63—Mineral Leases Regulations 4, 28.*—Construction of sec. 63 of 37 Vic. No. 13. *See per Docker, J.*, of the Mining Court of Appeal, at pp. 275-7:—Distinction between the rights of the holders of miners' rights and of mineral licenses as to area that may be occupied. *See per Judge Docker*, at pp. 276-7. *Anderson v. Pringle*, 13 N.S.W.L.R. (L.), 271; 9 W.N., 101 (1892). N.S.W.

12.—*Gold Mining Act 1885, secs. 5, 7—Mining license—Power of Warden.*—Her Majesty, through her Wardens of goldfields, has absolute discretion as to the issue of miners' rights or licenses under the *Gold Mining Act* 1885. *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucalt and Bunday, JJ.* (1889). S.A.

13.—*Crown Lands Act 1886—Local Courts Act 1886, sec. 138—Mineral license—Possession against a wrong-doer—Action by licensees—Non-suit.*—P. and D. were owners of two mineral licenses, and agreed with the plaintiffs that the plaintiffs should prospect the land held under license in consideration of a half interest in the claim and all the ore raised by the plaintiffs during three months. The plaintiffs entered on and raised from the land certain ore within the time limited, P. having, in the meantime, sold his interest in the said claims to a company, represented by the defendants. A mineral lease of the claims was granted under the *Crown Lands Act* 1886 by the Commissioner of Crown Lands



to the said company, and thereupon the defendants, including P., entered upon the land and seized the ore raised by the plaintiffs. In an action in trover in the local Court to recover the ore seized, plaintiffs were nonsuited. *Held*, that as between the plaintiffs and the defendants, the plaintiffs were owners of the ore raised by them, notwithstanding that under P. and D.'s mineral licenses they were not entitled to remove from the land more than one ton of ore; that as the evidence in support of the plaintiffs' claim was uncontradicted, and disclosed a legal right, the Court below had no power under the provisions of sec. 138 of the *Local Courts Act 1886* to nonsuit plaintiffs. *Lambert v. Putt*, 24 S.A.L.R., 58. F.C., *Way, C.J., Boucaut and Bunday, J.J.* (1890). N.Z.

14.—**Verbal license—Revocation.**—A verbal leave and license to use the land of the licensor, in derogation of his legal rights, may be determined by an assignment of the licensor's interest to a third person. *Robinson v. Blundell, Mac.*, 683. *Chapman, J.* (1867-8). N.Z.

15.—**Water license—Exception for irrigation purposes.**—Upon a license for two heads of water, the Warden indorsed "condition that the holders of leases in the agricultural reserves shall not be deprived of water (by the working of the race) for irrigation purposes." *Held*, that the effect of the condition was to except from the grant made to the race-holder so much water as might be reasonably required by the agriculturalists for the irrigation of ordinary and properly prepared land. *Ferland v. Holt*, 1 N.Z.J.R. (N.S.) M.L., 4. N.Z.

16.—**Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 5—Business license—Mining agent.**—The business carried on by a mining agent on the goldfields is not a "business" within the meaning of the *Goldfields Act 1866* (30 Vic. No. 32). *Inspector of Licenses v. Enright*, 1 N.Z.J.R. (N.S.) M.L., 26. N.Z.

17.—**License to mine for gold—Revocability—Expenditure.**—A license to mine for gold is not rendered irrevocable by the fact that the licensee has done work or expended money in exercise of his rights; nor would such a fact form a good equitable plea. *Hetherington v. Samson*, 4 N.Z.J.R. (N.S.) S.C., 84. N.Z.

18.—**Water license—Misrepresentation—Can-**

cellation.]—Where an original license has been obtained by misrepresentation, and the conditions prescribed by law have not been complied with at the time of the issue of such license, a Warden has power under the *N.Z. Goldfields Act 1866* (30 Vic. No. 32), and the regulations framed in accordance therewith, to cancel such license, although it has been several times renewed under these regulations. *Reg. v. Keddel*, N.Z.L.R. 1 S.C., 185. *Williams, J.* (1882). N.Z.

19.—**License to use water—Conditions.**—A license to make use of a water supply under the *Mines Act 1877* (N.Z.), (41 Vic. No. 42), is not bad on the face of it because granted subject to conditions which are not specified in the Act. The Warden may impose such conditions as in the public interest he deems desirable. *St. Bathans Channel Co. v. Watson*, N.Z.L.R. 5 S.C., 184. *Williams, J.* (1886). N.Z.

20.—**Water license—Priority—Occupancy.**—A party of miners made application for a license to draw off four heads of water for mining purposes from a creek. Subsequently, but before the application was disposed of, another party of miners made application to draw thirty-five heads of water from the same creek at a point lower down than the point at which the former party proposed to tap the creek. The latter party or their predecessors in title had, many years before application made, cut a water race, and through it had drawn and continued to draw off from the creek a supply of water not less than the supply now applied for. *Held*, that the Warden was bound to respect the prior occupancy and issue to the occupants a license prior in date to that of the license issued to the first applicants, and that in the event of there not being sufficient water to satisfy both parties, the first occupants had the superior right. *St. Bathans Channel Co. v. Watson*, N.Z.L.R. 5 S.C., 184. *Williams, J.* (1886). N.Z.

21.—**Pastoral lease—Occupation license—Consent of tenant.**—Where land is held by a pastoral tenant under the *Land Act 1885* (49 Vic. No. 56), sec. 60 of the *Mining Act 1886* (50 Vic. No. 51), and the regulations thereunder, the Warden has power to grant an occupation license without the consent of the pastoral tenant. *In re Beattie*, 8 N.Z.L.R., 256. *Williams, J.* (1889). N.Z.

22.—Water right—Exchange license—Priorities—Effect of license on priorities—Jurisdiction of Warden—Mining Act 1886 (50 Vic. No. 51), sec. 187.]—Where the owner of a water-race applies, under the provisions of the N.Z. *Mining Act* 1886 (50 Vic. No. 51), sec. 187, to surrender his license, the Warden, on the hearing, has jurisdiction to go into the question of the priority of the water rights surrendered, and, if he thinks fit, to embody the result of his inquiry in the new license. Such embodiment, however, does not give the applicant a better title than he had before he made his application. *Hesson v. Hyde*, 10 N.Z. L.R., 314. *Williams, J.* (1891). N.Z.

23.—Mining Act 1886 (N.Z.), (50 Vic. No. 51), sec. 183 — Mining lease — License.]—A license under sec. 183 of the *Mining Act* 1886 (50 Vic. No. 51), is not granted until it is signed and sealed as prescribed by sec. 119 of that Act, and whether it is or is not the duty of the Warden of his own motion to grant and issue a license under sec. 183, a mining lease is not converted into a license until such license is actually granted. *Commissioner of Crown Lands (Otago District) v. Guffie*; *Same v. Grayson*, 11 N.Z. L.R., 167. *Williams, J.* (1892). N.Z.

24.—Trespass — Licensors — Information and bill.]—See PRACTICE, 298.

25.—Mineral license—Mining Act 1874 (N.S.W.)—46 Vic. No. 7—Jurisdiction of Warden's Court.]—See PRACTICE, 428.

26.—Pastoral lease or license — Cancellation—Proclamation of goldfield.]—See LEASE, 76.

27.—“License” — “Certificate.”]—See CERTIFICATE, 4.

## LIEN

1.—Residence area—Forfeiture—Executor de son tort—Warden's jurisdiction — Husband and wife.]—H. was the holder of a residence area under Ballarat by-laws, and gave a lien thereon to secure repayment of money borrowed by him. H. died intestate. E. married his widow, and both refused to give possession to the lienee, who had not been paid. The lienee then brought a complaint for forfeiture against both, as executor and executrix *de son tort*. Held, by the Chief Judge, that the Warden had jurisdiction under

Act No. 291, sec. 101, sub-sec. 3, and sec. 177; that as both defendants were in possession both could be sued, and that an order should be drawn up, directing the husband to give up, and the wife not to withhold possession. *Fitzgerald v. Elliott*, 5 A.J.R., 3. *Molesworth, J.* (1874). V.

2.—Liens on leases—Right of public to inspect.]—See PRACTICE, 430a.

## LIQUIDATOR

See COMPANY.

## LIS PENDENS

See FORFEITURE.

## MACHINERY

See DRAINAGE; EMPLOYER AND EMPLOYEE; MINE; MUNICIPALITIES; NEGLIGENCE; PLATFORMS; PRACTICE, 413.

1.—Distress—Tenant at will—Trade fixture.]—The appellants were assignees of certain mining leases. The Alma Company Registered was their *tenant at will* in possession of the ground so leased. The company erected machinery on the ground, and it was admitted that this was a trade fixture. The tenancy at will was suddenly terminated *without notice*, and the appellants went into possession of land and machinery. The respondent, the execution creditor of the company, levied some days after possession was taken by the appellants on the machinery, as being the property of the company. On interpleader summons the magistrates held the execution right. Clarke appealed. Held, that the company had a right to enter and sever the fixtures after the appellants had taken possession, and that the fixtures were subject to be taken in execution to satisfy the debts of the company. *Clarke v. Tresider*, 4 W.W. & A'B. (L.), 164. Banco (1867). V.

2.—Regulation of Mines Statute 1877 (No. 583), sec. 6, sub-sec. XVI.—Mine—Safety appliance for cage — Manager — Respondent superior.]—A manager does not relieve himself from liability

for the absence of safety appliances for the cage required by sec. 6, sub-sec. XVI., of the *Regulation of Mines Statute* 1877 (No. 583), by merely reporting the want of them to his directors. *Stewart v. Davis*, 9 V.L.R. (L.), 116. *Stawell, C.J., Williams and Holroyd, JJ.* (1883). V.

3.—**Machinery**—Person in charge of—Erection of machinery—Negligence—Regulation of Mines Statute 1877.]—See NEGLIGENCE.

4. — **Drainage of Mines Act** 1877, sec. 3 — Order for contribution.]—See DRAINAGE.

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## MAINTENANCE

See CHAMPERTY ; SOLICITOR.

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## MALICE

Action for damages for loss incurred in defending mistaken action—Absence of malice.]—See PRACTICE (ACTION).

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## MANAGER

See COMPANY ; CLAIM ; EMPLOYER AND EMPLOYEE ; MACHINERY ; MUNICIPALITIES ; NEGLIGENCE ; PRACTICE ; TRUSTS.

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## MANDAMUS

See PRACTICE.

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## MANDATORY INJUNCTION

See PRACTICE.

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## MAP

See EVIDENCE ; PRACTICE (WARDEN) ; TRESPASS.

**Map**—Public — Boundary — Waste Lands Act 1867—Regulations of the Waste Lands Act 1868 —Surrender of pastoral lease—New lease.]—The pastoral lessee of certain land gave to the Government written notice that he had transferred to B. the land comprised in his lease, and a new lease was thereupon granted to B., the plan annexed to the original lease being removed and annexed to the new lease. Both leases referred to the public maps, independently of which the *locus in quo* could not be determined, and in consequence of alterations in these maps between the dates of the original lease and that to B., although the same diagram was used in both leases, it represented blocks of country differently situated, both blocks, however, including the land in dispute. *Held*, that the new lease comprising land not comprised in the original lease was, under the above circumstances, invalid. *McCulloch v. Whitting*, 10 S.A.L.R., 98. *Stow and Gwynne, JJ.* Common Law (1876). S.A.

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## MARKING OUT

See CLAIM ; LEASE ; RESIDENCE AREA ; TRESPASS.

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## MARRIED WOMAN

See HUSBAND AND WIFE.

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## MASTER AND SERVANT

See EMPLOYER AND EMPLOYEE.

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## MAXIMS

1.—Respondent superior—Manager — Want of safety appliance in mine.]—See MACHINERY, 2.

2.—Nullum tempus occurrit regi — Water — Reservation for public purposes — Rights of Crown.]—See WATER, 9.

3.—Quicquid plantatur solo, solo cedit—Fixtures—Mortgage—Boller.]—See MORTGAGE, 10.

4.—*Volenti non fit injuria*—Blasting in coal mine—Defect in system—Pleading—39 Vic. No. 31, sec. 12, sub-sec. 19.]—See EMPLOYER AND EMPLOYEE, 7.

## MEASUREMENT

See TRESPASS.

Goldfields Act 1874 (Q.), (38 Vic. No. 11), Regulation 44—Measurement of distance.]—See CLAIM, 29.

## MEETING

See COMPANY.

## MEMORANDUM OF ASSOCIATION

See COMPANY.

## MERGER

Abandonment of water race—Merger in freehold.]—See ABANDONMENT, 3.

## MINE

See COAL; CRIMINAL LAW; CROWN LANDS; LEASE; TRESPASS; WATER; WORDS.

1.—Criminal Law and Practice Statute 1864, sec. 104—Mine—Opening from surface.]—W. conveyed to the Bonshaw Mining Company, by two conveyances, two portions of land, which portions were divided by a road reserved by the Crown. The Bonshaw Company's underground works on both portions were accessible only from a shaft on one of them. On the other there was no shaft. On information against D. for stealing gold from the latter portion, under the *Criminal Law and Practice Statute 1864*, sec. 104, it was contended that the portion from which the gold was taken was not a mine, inasmuch as there was no opening from the surface on it. *Held*—(1.) That the reservation of the road was

not a reservation of the soil underneath, but merely of the right of passing over it; and (2.) That as mining operations could be carried on through the whole of the land from one shaft, the one shaft was sufficient to constitute that part of the claim from which the gold was taken "a mine" within the meaning of the section. *Reg. v. Davies*, 6 W.W. & A.B. (L.) 246; N.C., 65. Banco (1869). V.

2.—Regulation of Mines Statute 1873 (No. 480), sec. 5—Contravention of Act.]—The words "every person who contravenes, or does not comply with any of the general rules in this section, shall be guilty of an offence against this Act," in the first branch of the concluding clauses in sec. 5, in the *Regulation of Mines Statute 1873*, mean a personal contravention of the Act, as distinguished from a presumptive contravention, such as contemplated by the second branch of that clause. *Gibson v. Chalk*, 3 V.L.R. (L.), 17. Banco (1877). V.

3.—Order for inspection—Alleged encroachment—Motion for attachment—Obstacles presented by defendant to order being availed of.]—In a suit by the Attorney-General, and the licensees for gold mining purposes of the owners of private property, against an adjoining mine owner for an alleged encroachment, a motion by the plaintiffs other than the Attorney-General for inspection of the adjoining mine was granted to enable them to establish the fact of encroachment. *Semble*, that if the fact of encroachment had been admitted by the defendant, an inspection to ascertain the extent of the encroachment would not have been granted on such motion. An order for inspection of a mine was granted upon the plaintiff giving two days' notice, and with liberty to use defendant's machinery for descending and ascending the mine. After notice to inspect, defendant stopped working his mine, and plaintiff was thereby prevented from descending to inspect at the time appointed. Upon motion for attachment: *Held*, that under the literal terms of the order the defendant was not bound to provide firewood or engines, and motion dismissed, but without costs. *Attorney-General v. Lansell*, 6 V.L.R. (E.), 134; 1 A.L.T., 177. *Molenworth, J.* (1880). V.

4.—Regulation of Mines Statute 1877 (No. 583), sec. 6, sub-sec. X.—Mine—Signalling in shaft.]—Any mode of communicating between top and bottom of a shaft which is shown to be effective,

will satisfy the requirements of sec. 6, sub-sec. X. of the *Regulation of Mines Statute 1877* (No. 583). *Stewart v. Berryman*, 9 V.L.R. (L.), 116; 5 A.L.T., 19. *Stawell, C.J., Williams and Holroyd, JJ.* (1883). V.

5.—Gold mine used by testator and afterwards by his trustees—Non-intervention by Crown.]—Where a testator has used land for gold mining purposes, and the trustees under his will continue the operations and the Crown does not intervene, the ordinary rule applicable to mines worked by persons entitled in succession applies. *Cook v. Charlton*, 20 V.L.R., 529; 16 A.L.T., 45. *a'Beckett, J.* (1894). V.

6. — "Mine" — Goldfields Act 1852, sec. 34 — Construction.] — *Per Faucett, J.*, at p. 232:—By the definition in sec. 34 of the *Goldfields Act 1852*, the words "mining and digging" include the "obtaining" and taking away, and, consequently, the appropriating of the gold. *Per Faucett, J.*, at p. 233:—The definition of the word "mine" in the Act of 1867, is, if possible, still more distinct than in the Act of 1852, and expressly includes the appropriation of the gold to the use of the finder. *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258 (1874). *Martin, C.J., Hargrave and Faucett, JJ.* See CROWN; CRIMINAL LAW. N.S.W.

7.—Mine forfeited through fraudulent representations.]—Where the mining property of a company was forfeited owing to the fraudulent representations of a person, made to the Minister for Mines, and that person afterwards took up the mine: *Held*, that he was a trustee of the mine for the company. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281. F.C., *Darley, C.J., Manning and Cohen, JJ.* (1896). N.S.W.

8.—Coal Mines Regulation Act 1876, sec. 12, sub-secs. 2, 3, 4—Ventilation of mine—"Working place"—Meaning of.]—In sub-sec. 3 of sec. 12 of the *Coal Mines Regulation Act 1876*, "working place" means the bord and not the face from which the men hew the coal. Under sub-secs. 2 and 3 of sec. 12, in order that the working places should be adequately ventilated, it is not necessary that 100 cubic feet of air per minute for each man should pass from the air-way up the bord to the face where the men are actually at work. *Per totam curiam*. In a prosecution under sub-sec. 2 of sec. 12 against a manager of a

mine, for not providing adequate ventilation in the working places, in which the defendant was found guilty, it appeared that the magistrate took the view of sub-secs. 2 and 3 that an adequate amount of ventilation meant that not less than 100 cubic feet of air per minute for each man must pass from the air-way up the bord to the face. *Held, per Darley, C.J., and Stephen, J. (Simpson, J., diss.)*, that as the finding of the magistrate was based on a misconception of those sub-sections, his decision could not be upheld. *Held, per Simpson, J.*, that as there was evidence to show that the working places were not in fact properly ventilated, his decision should not be upset, although he had given wrong reasons for his decision. *Brough v. Homfray*, L.R. 3 Q.B., 771, considered. *Ex parte Ross*, 17 N.S.W.L.R. (L.), 212; 13 W.N., 3. Banco (1896). N.S.W.

9.—Regulation of Mines Statute 1877 (No. 583), sec. 6, sub-sec. XVI.—Mine—Safety appliance for cage—Manager—Respondent superior.]—See MACHINERY, 2.

10.—Mines—Gold, silver and coal—Clause in Crown grant—Corporeal hereditament—Intrusion, information of.]—See CROWN LANDS, 8.

11.—Mine—Assignment of, to secure advances—Trust deed—Sale under power—Excessive demand—Proviso for protection of purchasers—Notice—Breach of trust—Avoidance of sale—Account when taken.]—See TRUSTS.

12.—Mine—Situated in N.S.W., company registered in Victoria—Stamp Duties Acts—Shares.] See COMPANY, 235.

13.—Mine—De facto possession of—Evidence.]—See LEASE, 61, 62, 63.

14.—Mining business—Interim injunction to restrain working.]—See PRACTICE, 193a.

15.—Mine—Mine-owner as insurer against accidents in—Mines Regulation Act 1889 (53 Vic. No. 7), secs. 18, 26 (Q.).]—See NEGLIGENCE, 4.

16.—Injury to water-courses.]—See WATER, 14, 15.

## MINER

See EMPLOYER AND EMPLOYEE.

### MINERAL CONDITIONAL LEASE

Crown Lands Act (25 Vic. No. 1), sec. 13—Population area—Census.]—See *Thorne v. Kerr*, 1 N.S.W.W.N., 24. *Faucett, Windeyer and Innes, JJ.* (1884).

### MINERAL CONDITIONAL PURCHASE

See CROWN LANDS, 10.

### MINERAL LEASE

See LEASE.

### MINERAL LICENSE

See LICENSE.

### MINER'S RIGHT

See ASSIGNEE; CROWN LANDS; DAMAGES; EVIDENCE; FORFEITURE; HUSBAND AND WIFE; LEASE; LICENSE; PRACTICE; RESIDENCE AREA; ROAD; WATER.

1.—Evidence.]—In a bill in equity (relating to mining), it was not necessary to allege that the plaintiffs were holders of miners' rights when the cause of suit arose; though it might have been necessary to have given evidence thereof, before final relief could have been given. *Lee v. Robertson*, 1 W. & W. (E.), 390. *Chapman, J.* (1863). V.

2.—Mining on roads.]—The holder of a miner's right is not entitled to mine on a public road without the permission of the proper authority. *House v. Ah Sue*, 2 W. & W. (L.), 41. Banco (1863). V.

3.—Right to sue.]—A person not the holder of a miner's right purchased a share in a claim, and the share was declared forfeited by his co-partners before he took out a miner's right. After the forfeiture, but before the passing of the *Goldfields Act Amendment Act* (No. 115), he took out a miner's right, and instituted proceedings

to set aside the forfeiture. *Held*, that as he had a miner's right before the Act No. 115 was passed, he could maintain the suit under sec. 8 of that Act. *Jones v. Abraham*, 2 W. & W. (L.), 158. Banco (1863). V.

4.—Interest in claim.]—The interest of the holder of a "miner's right" in his "claim" is at the utmost an estate in will; and for such an estate an action of ejectment cannot be maintained. *Jennings v. Kinsella*, 1 W.W. & A'B. (L.), 47. Banco (1864). V.

5.—Registered company.]—A gold mining company registered under the Act No. 228, is entitled to a miner's right in its corporate name. *In re Verdon, ex parte Albion Co.*, 1 W.W. & A'B. (L.), 207. Banco (1864). V.

6.—Claims—Ownership of gold—Possession.]—Under the Act No. 32, and the Ballarat By-laws of 1865, no person had any right to mark out or take up a block claim on any part of the duly registered frontage claim of another, either before or after the discovery of the lead within the frontage claim. By the Act No. 32, the holder of a miner's right is entitled to all gold in and upon any land occupied as a claim—such claim being so much of the Crown lands as may be prescribed by the by-laws. Possession in conformity with the by-laws, therefore, gives to the holder of a miner's right a title to the claim, and to all gold in and upon that claim. *Quære*, whether a by-law could be framed so as to give one portion of land to a certain depth to one person, and another portion at a different depth to another. *McGill v. Tatham*, 2 W.W. & A'B. (L.), 54. Banco (1865). V.

7.—Ownership of gold.]—The owner of a claim under the Act No. 32, taken up in accordance with the by-laws of a mining board, is entitled to all the gold found within the claim, whether the gold is in the quartz or in the soil generally. *Scottish and Cornish Co. v. Great Gulf Co.*, 2 W.W. & A'B. (L.), 103. Banco (1865). V.

8.—Right to sue.]—M. held a share in a mining company in July, 1857; he was excluded by his co-partners from the claim in 1862, for being in arrear with his calls, he having no miner's right at the time. In 1864, he took out a miner's right, and instituted a suit against his former co-partners (who had in the meantime formed a registered company and were working the ground as such), that he might be declared entitled to

his share of the ground, and for an account—dissolution and sale of the property. *Held*, that as he had no miner's right at the time the cause of action arose, he could not, under the Act No. 32, sec. 90, maintain the suit. *Mackeprang v. Watson*, 2 W.W. & A'B. (L.), 106. Banco (1865). V.

**9.—Right to sue—Corporate miner's right.]**

—A suit was instituted by a registered company in the Court of Mines, to restrain certain persons from obtaining registration of claims on certain leads, and to restrain them from mining within the boundaries of plaintiff's claim. Each member of the company held a miner's right, but there was no corporate miner's right. *Held*, that the Act No. 32, sec. 90, had been complied with, and that the suit could be maintained. *Smith v. Scottish and Cornish Co. Regd.*, 2 W.W. & A'B. (L.), 121. Banco (1865). V.

**10.—Trustee—Cestui que trust.]**—Separate miners' rights, both for the trustee and for his *cestui que trust* are not required. *Cestui que trust* having no miner's right, may sue his trustee, who has one, in the Court of Mines, for the recovery of shares in a claim. *McDougall v. Webster*, 2 W.W. & A'B. (L.), 164. Banco (1865). V.

**11.—Mortgagor.]**—Where a plaintiff in equity; in a redemption suit, held a miner's right when the security was given and fell due, and also held a miner's right when the bill was filed: *Held*, that this was a sufficient compliance with the Act No. 32, sec. 90. *Niemann v. Weller*, 3 W.W. & A'B. (E.), 125. F.C. (1866). V.

**11a.**—"I do not think that a mortgagor of mining shares seeking redemption is liable to the necessity of holding a miner's right, under sec. 90 of the Act No. 32."—*Per Molesworth, J. Ibid.* V.

**12.—Mortgagor and mortgagee.]**—*Held*, that it was not necessary for the plaintiff (a mortgagor of mining shares seeking redemption), as a mortgagor, to have been in continuous possession of a miner's right; the possession of a miner's right by the mortgagee enuring to the benefit of the mortgagor. *Salmon v. Mulcahy*, 3 W.W. & A'B. (E.), 139 (n). Banco (1863). V.

**13.—Registered company—Trustees—Right to sue.]**—A company registered under the Act No. 228, and its trustees, sued in the Court of Mines to set aside a sale of its claim by the

bailiff under a warrant. No miner's right to the company was produced, but rights to the trustees, co-plaintiffs. *Held*, that the miners' rights were insufficient to entitle the company to maintain the suit. *Volunteer Extended G.M. Co. Regd. v. Grand Junction Extended G.M. Co. Regd.*, 4 W.W. & A'B. (M.), 7. *Molesworth, J. (1867)*. V.

**14.—Trustee.]**—*Semble*, that a holder of a miner's right may take up a claim as a trustee for, or confer an equitable interest in it, upon another, not holding a miner's right. *Ibid*, at p. 14. V.

**15.—Registered companies—Sufficient miners' rights.]**—The United Extended Band of Hope Company Registered and William McCafferty and John Lovie summoned Chisholm and others before the Warden for encroaching on the claim of the company. The Warden decided in favour of the company. The defendants appealed to the Court of Mines. The ground on which the encroachment had been made consisted of forty-four men's ground taken up in September, 1859, by forty-four individuals, each holding a miner's right. The company was subsequently registered under Act No. 228. In 1865 the interests of the forty-four men became vested by transfers in William McCafferty and John Lovie, as trustees for their co-complainant, the Band of Hope Company. McCafferty and Lovie each held a miner's right. The company also held what purported to be a consolidated miner's right issued to the manager, and which represented two miners' rights. On special case stated for the opinion of the Chief Judge: *Held*, that the case fell within the principle of the *Volunteer Extended G.M. Co. Regd. v. Grand Junction Extended G.M. Co. Regd.*, 4 W.W. & A'B. (M.), 7; and that the miners' rights were insufficient. *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.), 31. *Molesworth, J. (1867)*. V.

**16.—Registered companies—Consolidated miners' rights.]**—"Act No. 291, sec. 4, is, I think, consistent with the companies registered under Act No. 228 being entitled, as well as others, to consolidated miners' rights; and the employment of the word 'manager' in the singular looks as if its framers had special regard to such companies. I think we must hold the words 'number of persons in conjunction who shall be the holders of any such miner's right,' to include

incorporated companies."—*Per Molesworth, J., Albion Co. v. St. George United Co.*, 4 W.W. & A'B. (M.), 59 (1867). V.

16a.]—*Semle*, that a company registered under Act No. 228, can sue without holding a miner's right in its corporate name. A consolidated right in the name of the manager for the proper number of rights is sufficient. *Ibid.* V.

17.—Registered companies—Consolidated miner's rights.]—A registered company, plaintiff, and its co-plaintiffs, trustees for three claims, sued in the Court of Mines. The plaintiff company never had a miner's right, but obtained a consolidated miner's right, as for two men's ground only, in the name of its manager. *Held*, that the case involved the same points as the *Volunteer Extended G. M. Co. Regd. v. Grand Junction G. M. Co. Regd.*, 4 W.W. & A'B. (M.), 7, and *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.), 31, and that the miners' rights were insufficient. *Great North West Co. Regd. v. Menhennet*, 4 W.W. & A'B. (M.), 63. *Molesworth, J.* (1867). V.

18.—Enforcing forfeiture.]—It is not necessary that the person seeking to enforce a forfeiture should have had a miner's right at the time the forfeiture was incurred. It is sufficient if he has one when complaint is made. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74. *Molesworth, J.* (1867). V.

19.—By-law—Plurality of claims.]—There is nothing in the *Mining Statute 1865* to make a by-law void, which enables the holder of a miner's right to take up several single claims under it. *Crocker v. Wigg*, 5 W.W. & A'B. (M.), 20. *Molesworth, J.* (1868). V.

20.—Plurality of miners' rights—Taking possession.]—Sec. 3 of the *Mining Statute 1865*, is that which alone authorises the taking-up of unoccupied land, and the provision that "any person who shall be the holder, and any number of persons in conjunction, who shall each be the holder of any such miner's right, shall be entitled to take possession," cannot in any reasonable construction of the words enable a person to multiply himself or his powers by multiplying his miner's rights. The mining boards are authorised to limit the quantity to be taken by each holder of a miner's right. *Held*, regarding the *Mining Statute 1865*, and a by-law of a mining board, which did not expressly enact that multi-

plied miners' rights should give power to take up multiplied quantities, that one person by obtaining five miners' rights in his own name cannot take up and retain possession of five men's ground. *Quære*, whether the by-laws could enact that multiplied miners' rights give power to take up multiplied quantities. *Cawley v. Ling*, 6 W.W. & A'B. (M.), 12. *Molesworth, J.* (1869). V.

21.—Right to sue—Vendor and vendee.]—M. and others, holding and working a surface claim, entered into an agreement with L. and others for the sale of the claim to them. The vendors refused to complete the agreement. The purchasers sued in equity for specific performance, and succeeded. On appeal, it was argued (*inter alia*), on behalf of the vendors, that at the time of the alleged breach of the agreement the purchasers had no miners' rights, and were therefore not entitled to institute the suit (*Mining Statute 1865*, sec. 246). No evidence was given as to the holding of miner's rights by either the vendors or the purchasers. Judgment was given in favour of the purchasers and specific performance decreed. As to the miners' rights, the Chief Justice, in delivering judgment, said:—"No evidence was given as to the holding of miners' rights by the members of either company. The Court has hitherto acted on the principle that in the case of trustee and *cestui que trust*—mortgagee and mortgagor for example—it is sufficient if the trustee or mortgagee hold a miner's right; it is not necessary that the *cestui que trust* in a suit to enforce his rights against the trustee should also hold or have held one. This principle has been acted on and recognised on several occasions, and may, in our opinion, be applied to the case of a vendor and his purchasers, as in the present instance. So far as the appellants (M. and others), themselves are concerned, the Court will not presume either way as to whether they did or did not hold these documents. We think, however, that assuming the question to be at issue between the parties, it lay on the appellants taking the objection to show that although working a claim themselves, they were doing so without the necessary title. If they were holders thereof, their being so would for the present suffice to sustain the purchasers' rights, and for the purposes of the objection merely, we are not to presume the contrary." *Learmouth v. Morris*, 6 W.W. & A'B. (E.), 87. F.C. (1869). V.



22.—*Authority conferred by—Private property—Mining Statute 1865.*—The provisions of the *Mining Statute 1865*, refer either to Crown lands, or lands leased from the Crown for mining purposes. Miners' rights confer no authority to enter on and take gold from lands alienated from the Crown without the consent of the proprietor. Payment is made for miners' rights to work Crown lands, and Crown lands only. *Reg. v. Davies*, 6 W.W. & A'B. (L.), 246; N.C., 64. Banco (1869). V.

23.—*Jurisdiction of justices—Question of title—Act No. 117, sec. 59—Police Offences Statute 1865, sec. 67—Race—Prohibition.*—Rule nisi for a prohibition under the *Justices of the Peace Statute 1865*, sec. 136. By the *Land Act 1860* (No. 117), sec. 59, races and dams on land sold under the Act are protected against interference by the purchaser, although no reservation appears on the Crown grant; and a power was reserved to the Board of Land and Works to license persons to enter upon land so sold for the purpose of cleansing or improving any such race or dam. C. and party had a race on Crown land prior to December, 1861, at which date the land was sold to G. In April, 1870, G. ploughed up the land and destroyed the race. G. was summoned under the *Police Offences Statute 1865*, sec. 17, sub-sec. 1, and the magistrates fined him one shilling, with £3 damages, and £3 3s. costs. On the hearing of the complaint the defendant produced his Crown grant, and contended that he had the right to do what he had done. The complainants admitted defendant's title, but argued that their race was reserved by virtue of the *Land Act* and subsequent Statutes. *Held*, that a *bona fide* question of title had been raised, and that the jurisdiction of the magistrates was ousted. "The defendant relied on his Crown grant, the complainants upon the Statute and their miners' rights; and it is not for the justices to say which is paramount."—*Per Stawell, C.J.* Rule made absolute. *Reg. v. Webster*, 1 V.R. (L.), 82; 1 A.J.R., 78. Banco (1870). V.

24.—*Act No. 291, sec. 246—Certiorari.*—It is not necessary for the prosecutor to have a miner's right in an application for a *certiorari* to bring up a Warden's order to be quashed. *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.), 155; 2 A.J.R., 110. Banco (1871). V.

25.—*Taking too much ground—Plan with complaint—Withdrawal of co-complainant.*—Milne

and others sought by plaint before Warden to be put in possession of an area of thirty-four acres occupied in excess of what they were entitled to under the Ballarat By-laws by Morell and others as shown on a plan annexed to the plaint. The plan showed thirty acres only. The seven defendants held two miners' rights each, and occupied fourteen men's ground. *Held*, following *Carolay v. Ling*, 6 W.W. & A'B. (M.), 12, that one person cannot hold more than one man's ground by holding several miner's rights, and that the defendants were not legally in occupation of the excess. *Held*, further, that although the complainants were entitled to thirty-four acres, the actual excess, yet they were bound by the plan and could only get the quantity shown thereon—thirty acres. When one of several complainants in such a proceeding withdraws after the issue of the plaint, having changed his mind, such withdrawal does not defeat the remaining complainants as to their rights to be put in possession of the portion to which they are entitled. *Milne v. Morell*, 3 A.J.R., 21. *Molesworth, J.* (1872). V.

26.—*Lease—Claim—Parties—Special case—Act No. 291, sec. 171.*—A suit was brought in a Court of Mines by a registered company (not holding a miner's right) and co-plaintiffs, trustees for it, having miners' rights, for encroachment on the mine of the company. The mine consisted of land leased to the company, land leased to co-plaintiffs as trustees for the company, and land held by co-plaintiffs as a claim, in trust for the company. On case stated for the opinion of the Chief Judge: *Held*, that it was not distinguishable from the *Volunteer Extended Co. v. Grand Junction*, 4 W.W. & A'B. (M.), 6, as to the plaintiff company not being entitled to relief as to the claim, inasmuch as it had not a miner's right, but that the company might obtain relief as to the leased land, the suit being dismissed as to the claim, with costs as against some or all of the plaintiffs as the judge should determine. *Held* also, that the plaint was objectionable as referring to land held under different titles, and making co-plaintiffs persons not interested in all. The case set out all the evidence and asked this further question.—Assuming the miners' rights to be sufficient, are the plaintiffs on the evidence entitled to any relief? *Held*, that as the evidence was complicated and conflicting, and as the case embraced many questions of law and fact, the question was not a proper one to be asked under

Act No. 291, sec. 171, and the Chief Judge would not answer it. *Australasian Co. v. Wilson*, 4 A.J.R., 18. *Molesworth, J.* (1873). V.

27.—Certificate of title—Ejectment—Lease—Transfer of Land Statute.]—Mere possession of land under a miner's right is not a reservation or exception within the meaning of the proviso to the *Transfer of Land Statute*, sec. 49, and in an action of ejectment is no answer to the holder of a certificate of title, although the certificate relates to land held by lease under Act No. 291, sec. 24. *Munro v. Sutherland*, 4 A.J.R., 166. *Banco* (1873). V.

28.—Act No. 291, sec. 246—Trespass.]—If a plaintiff has a miner's right in force at the time when a cause of action for trespass has accrued, he is entitled to sue although he had not a miner's right in force at the time the trespass began. *Sea Queen Co. v. Sea Quartz Co.*, 4 A.J.R., 130. *Molesworth, J.* (1873). V.

29.—Termination—Onus probandi—Act No. 291, secs. 4, 5, 12, 246—"Save as against Her Majesty"—Fiscal policy.]—In a suit to obtain possession of a claim on the ground that the defendant had no miner's right in force at the date of the commencement of the suit: *Held*, that the onus of proof is on the defendant to show that he held such a miner's right. The termination before the commencement of such a suit of the miner's right under which the defendant previously held the claim, such miner's right not having been renewed up to that time, terminated the defendant's interest in the claim as against the complainant. The expression "save as against Her Majesty" in Act No. 291, sec. 5, only means that even during the continuance of the miner's right, the Crown may revoke it. Courts of Justice should aid, not struggle against, the fiscal policy of the law on such subjects. *Lennox v. Golden Fleece and Heales Co.*, 5 A.J.R., 18. *Molesworth, J.* (1874). V.

30.]—Where fifty-three persons sued before a Warden for trespass, and it appeared that only thirty-three of them had miners' rights at the date of the alleged trespass, and the date of the summons: *Held*, that the Warden could not make an order in favour of the complainants generally, or in favour of those holding miners' rights. No amendment was asked for on the hearing. *Semble*, that re-marking out not followed by registration, has no effect on title.

*Bebro v. Bloomfield*, 5 V.L.R. (M.), 26. *Molesworth, J.* (1879). V.

31.—Miner's right—Appropriation of, to special ground.]—A miner's right need not, at the time of issue, be appropriated to any particular ground. It may under the Ballarat By-law XI., be held to protect any number of men's ground not exceeding fifty, although at the time it was taken out it was not contemplated so to apply it, and it is sufficient to protect ground previously protected by a consolidated miner's right, which had expired. *Fattorini v. Band and Albion Consols*, 9 V.L.R. (M.), 1; 4 A.L.T., 121. *Molesworth, J.* (1883). V.

32.—Mining Statute 1865 (No. 291), secs. 5, 36—Miner's right—Proclaimed timber reserves.]—The privileges conferred by secs. 5 and 36 of the *Mining Statute* 1865 (No. 291), do not extend to the cutting of timber on land specially proclaimed as a timber reserve. *La Gerche v. Ah Ham*, 7 A.L.T., 70. F.C., *Higinbotham, Williams and Holroyd, JJ.* (1885). V.

33.—Mines Act 1890 (No. 1120), sec. 4—Occupation for mining purposes—Occupation for residence—Penalty for unauthorised occupation—Land Act 1890 (No. 1106), sec. 113.]—Persons occupying land for mining purposes under a miner's right cannot, under that right, occupy the land for residential purposes. Such occupation by way of residence is an unauthorised occupation, and is punishable by fine under sec. 113 of the *Land Act* 1890 (No. 1106). *Bannerman v. Sexton*, 16 V.L.R., 601; 12 A.L.T., 96. F.C., *Higinbotham, C.J., Webb and Hodges, JJ.* (1890). V.

34.—Mines Act 1890 (No. 1120), secs. 15, 19—Miner's right—Permit by council—Public road.]—It is the miner's right and not the permit of the local council which gives the title to mine under a public road. *Sims v. Demamiel*, 21 V.L.R., 643; 17 A.L.T., 129, 241; 2 A.L.R., 51. F.C., *Holroyd, a'Beckett and Hood, JJ.* (reversing *Madden, C.J.*), (1895-6). V.

35.—Allen—Goldfield.]—"A holder of a miner's right can mine on any Crown lands, whether a goldfield or not; and an alien therefore being such holder can mine elsewhere besides on a goldfield; if therefore these latter words 'at such places only, as shall be named in such proclamation,' are confined to goldfields, then there would

appear to be no power to prevent them mining anywhere else except on a goldfield."—*Per Wise, J. (arg.)*, at p. 227, *Ex parte Ah Tchih*, 3 N.S.W. S.C.R. (L.), 226. *Stephen, C.J.*, and *Milford, J. (Wise, J., diss.)*, (1864). And see ALIEN.

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36.—Mining Act 1874, secs. 15, 16, 17, 18, 19—Uncertificated insolvent—Official assignee—Claim does not lapse on insolvency of miner—Insolvent Act (5 Vic. No. 17), secs. 53, 54.]—If an uncertificated insolvent obtains a miner's right, that document, and any mining claim he may acquire under it, passes to his official assignee if he intervene. *Bourke v. Wright*, 3 N.S.W.L.R. (L.), 145. *Martin, C.J.*, and *Faucett, J.* (1882). See *Bourke v. Lucas*, *infra*.

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37.—Insolvency—Uncertificated insolvent—Rights against stranger—Intervention of official assignee after Warden's decision—"Re-hearing"—Value of property involved—Practice—Jurisdiction.]—B., an uncertificated insolvent, became the holder of a miner's right, and took up a claim on a goldfield. L. got into possession of the claim, and applied to be registered as holder. B. took out a summons in the Warden's Court, calling upon L. to show cause why his application should not be refused. The Warden decided in favour of B. L. appealed to the District Court; and in addition to the grounds taken before the Warden, took the ground that at the time that B. took up the claim, and at the time that the summons was issued, he was an uncertificated insolvent. It also appeared that after the Warden's decision, but before the hearing in the District Court, the official assignee had intervened and sold B.'s right to the claim. On these facts being admitted to be true, the District Court judge, without deciding the other grounds taken, reversed the Warden's decision on the ground that B. had no title whatever to the claim. B. then appealed to the Supreme Court. *Held*, that, no intervention by the official assignee having taken place when the summons was issued, B. had a right to institute the proceedings in the Warden's Court. *Bourke v. Wright*, 3 N.S.W. L.R. (L.), 145, explained. *Held*, also, that the proceedings in the District Court, although called a "re-hearing" in sec. 109 of the *Mining Act* 1874, are nothing more than a continuation of the proceedings in the Warden's Court; and L. was not entitled to avail himself of the intervention of B.'s official assignee after the suit had

been instituted, and the decision of the Warden given. *Held*, also, that although there was nothing in the proceedings before the District Court to show that the value of the property involved exceeded £50, the Supreme Court could entertain the appeal. The Court allowed the appeal, but directed that the matter be re-heard before the District Court on the grounds already taken, but not determined there. *Per Martin, C.J.*, at p. 222:—"This Court has held that the sequestration passed that right, and any claim acquired under it, to the official assignee. But the Court did not hold that it passed a bare miner's right, which would be of no use to the official assignee; the case of *Bourke v. Wright* decided that where property had been acquired under it, the property was assets for the payment of his debts, and the paper which was necessary to give title passed with it." *Bourke v. Lucas*, 3 N.S.W.L.R. (L.), 217. *Martin, C.J.*, and *Windeyer, J.* (1882). N.S.W.

38.—Miner's right—What it is—Not a title deed to land.]—*Per Martin, C.J.*, at pp. 146, 147:—"A 'miner's right' is no more than a document showing that the holder is entitled to enter upon land to search for gold, and to take possession of such portions of land, under certain conditions, as he thinks contain minerals. It is not a title deed showing that he is the owner of land but is a document showing that he has a right to avail himself of the mining laws. Unless he takes out a miner's right he cannot take up a claim; he pays ten shillings tax to the public treasury for these privileges. The document puts him in a position to select land for mining purposes." *Bourke v. Wright*, 3 N.S.W.L.R. (L.), 145. *Martin, C.J.*, and *Faucett, J.* (1882). N.S.W.

39.—Miner's right—Mining Act (37 Vic. No. 13), and Mining Board Regulations—Right to take up more than one claim—Registration of claim by Mining Registrar—How far conclusive.]—*Per Owen, C.J.*:—"The holder of a miner's right may take up any number of quartz claims, provided each claim does not exceed sixty feet along the base line. A. took up in succession two quartz claims each of the full area allowed by law. B., contending that the taking up of the second claim by A. was a constructive abandonment of the first, pegged out the first claim and applied to be registered as the holder of it as being an abandoned share. B. did not, however, get

actual possession of the claim. A's objection to the registration was decided in his favour by the Warden, but on a technical point as to the jurisdiction B. obtained a rule absolute from the Supreme Court for a prohibition restraining further proceedings on the Warden's order. B's title was thereupon registered by the Registrar. *Held*, that the registration was not conclusive against A. *Mongan v. Readford*, 5 N.S.W.L.R. (L.), 383; 1 W.N., 86, explained. *Lucas v. Neeld*, 16 N.S.W.L.R. (E.), 257; 12 W.N., 17, 57. *Darley, C.J., Manning and Cohen, JJ.* (1895). N.S.W.

**40.—Miner's right—Description of holder.]—**It is not necessary that a miner's right should bear the full name of the holder. It is only a question of proof of identity between the person named in the right and the claimant of the right. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 323. F.C., *Darley, C.J., Manning and Cohen, JJ.* (1896). N.S.W.

**41.—Victorian company—Power to mine in N.S.W.]—**A company registered in Victoria under the Act No. 409 can acquire a miner's right and mine for gold in N.S.W. under the *Mining Act* of that colony. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 322. F.C., *Darley, C.J., Manning and Cohen, JJ.* (1896). N.S.W.

**42.—Form of miner's right to be taken out by corporation.]—**It is only necessary that a corporation should possess one miner's right to be entitled to mine. It is not necessary that each member of the corporation should have a miner's right. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 323. F.C., *Darley, C.J. Manning and Cohen, JJ.* (1896). N.S.W.

**43.—Mining Act 1874 (37 Vic. No. 13), sec. 19.—Miner's right—Suit for specific performance of contract.]—**A., before acquiring a miner's right, contracted to purchase a miner's lease from B. *Held*, that that did not disentitle A. from bringing a suit for specific performance of the contract provided he acquired a miner's right before B. refused to carry out the contract. *Semble*, it is unnecessary in a suit by a purchaser of a mine to enforce his rights against a vendor, that the purchaser should have a miner's right at all. *Mackeprang v. Watson*, 2 W.W. & A'B. (L.), 106; and *Learmonth v. Morris*, 6 W.W. & A'B. (E.), 74, considered. *Barclay v. Neeld*, 11 N.S.W.W.N., 9. *Owen, J.* (1894). N.S.W.

**43a.—Goldfields Act 1874 (38 Vic. No. 11), sec. 67—Land held under miner's right—Sale by bailiff—Transfer—Possession.]—**A bailiff selling land held under a miner's right in execution of a judgment recovered in a small debts Court, has power to give immediate possession to the transferee under sec. 67 of the *Goldfields Act* 1874. *Ex parte Kermode*, 7 Q.L.J. (N.C.), 91. *Lilley, J.*, 9th Aug., 1876. Q.

**44.—Holder of miner's right—When interest accrues.]—**The holder of a miner's right has no interest until he acquires a claim by compliance with the provisions of the *Goldfields Act* 1874 (38 Vic. No. 11), and the regulations thereunder. *Osborne v. Morgan*, 2 Q.L.J., 113. *Harding and Mein, JJ.* (1886), affirmed 13 App. Cas., 227. J.C., *Lords Watson, Fitzgerald, Hobhouse and Macnaghten*, and *Sir Barnes Peacock* (1888). Q.

**45.—Holder of miner's right—Right to bring action to have interest of persons in possession under Crown lease declared void.]—**A holder of a miner's right who has not entered into possession cannot bring an action to have the interest of persons in possession of land under a Crown lease declared void on the ground of the lease having been improperly granted or there being a defect in the grant. *Osborne v. Morgan, Martin v. Morgan*, 2 Q.L.J., 113. *Harding and Mein, JJ.* (1886), affirmed 13 App. Cas., 227. J.C., *Lords Watson, Fitzgerald, Hobhouse and Macnaghten*, and *Sir Barnes Peacock* (1888). Q.

**46.—Goldfields Act (Q.) 1874 (38 Vic. No. 11), secs. 9, 62-64—Regulations 30, 60-72—Miner's right—Water rights—Gold mining lease—Right to subsoil.]—**The holders of miners' rights being registered as proprietors of certain areas, called water rights, and being in occupation and having performed all conditions, objected to a lease being granted for mining purposes comprising part of their water rights, and claimed an injunction. *Held*, that assuming the facts stated, the defendant was entitled to mine under the surface occupied by the plaintiffs as water rights. *Hall v. Gorrie*, 3 Q.L.J., 113. F.C., *Lilley, C.J., Harding and Mein, JJ.* (1888). Q.

**47.—Gold Mining Act 1885, secs. 5, 7—Miner's right—Power of Warden.]—**Her Majesty, through her Wardens of goldfields, has absolute discretion as to the issue of miners' rights or

licenses under the *Gold Mining Act 1885*. *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucaut and Bunday, JJ.* (1889). S.A.

48.—*Gold Mining Act 1885, secs. 5, 7—Miner's right—Power of Crown to restrain operation of.*—*Per Boucaut, J.*, at pp. 165, 166:—"The Act as framed says that, as against all the world, a miner's right shall operate all over the colony . . . [and] having taken such an exceedingly large grasp as that, it occurred to the framers of the Act that there must be something left to the officers of the Crown, and they have left it by saying that the Crown which gives the miner's right shall not be touched by it. That is the effect of sec. 7 and sec. 5. So a miner's right does not operate over the whole of the colony of South Australia, but only over such a part as the Government chooses. The *ipse dixit* of the Crown can be interposed at any moment and in any way it chooses, consequently these miner's rights do not confer a tittle of right as against the Crown itself, because the holders are only entitled 'except as against Her Majesty.'" *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucaut and Bunday, JJ.* (1889). S.A.

49.—*Miner's right—What is it?*—*Per Chapman, J.*:—"What, then, is the nature of the right which the holder of the instrument called a 'miner's right' acquires in the waste lands of the Crown under the *Goldfields Act 1862*? On the one hand, it is clearly not an estate, for that has a technical meaning which the nature of the miner's enjoyment does not amount to. The certificate which the regulations provide for is often called a license, and is so designated in this case; but we must not permit our judgment to be clouded by the use of a word. A mere license in law is revocable. . . . But, although called a license, is not the certificate under the *Goldfields Regulations 1863* and *1864*, and the occupation under it, something more? The word license, indeed, seems rather to be the popular designation of the instrument than a word designed to express the legal right of the holder of the miner's right. What the miner's legal right is must be sought in the Act of 1862, repeated with more or less elaboration in the subsequent Acts. It is a right 'to occupy for mining purposes the waste lands of the Crown within the goldfields.' Now, the very expression of the purpose seems

to assume two things, namely, permanency or a certain measure of permanency, and the expenditure of capital and labour. It is precisely that kind of right which one man may confer upon another by grant—a right to a beneficial enjoyment in the land of another; not an estate in the land itself, but a right to reap some benefit from the land. It is, as it seems to me, that sort of right which is properly called an easement. It is an incorporeal right capable of transmission. . . . It seems to me that at the very earliest date of the leases to the appellants (May, 1865), the Crown had, by the Statute and regulations, irrevocably conferred on the respondent an easement in the waste lands of the Crown, which could only be put an end to by judgment or matter of record. It is analogous to the case of A. granting to B. a right-of-way over his own lands, except that the easement in the case before me is created by Statute. When, therefore, the Crown, under the authority of the 35th section of the same Statute, grants what is called an agricultural lease of the same lands, it can only grant subject to the previously created right. The Crown, like the subject, can grant no more than it has. If the Crown has demised for a term, it can afterwards grant in fee, no doubt, but only subject to the term; and, in like manner, if the Crown has granted an easement the subsequent demise is subject to that easement. . . . Whatever rights the Crown may retain against the occupant they had not been determined at the date of the subsequent grant of the first lease; and, therefore, I am of opinion that the leases were subject to the preceding right. I have ventured to characterise that right as an easement. It is certainly not an estate. It is not a mere license, the very nature of which is to be revocable." *Robinson v. Blundell, Mac.*, 683, at pp. 691-3 (1867-8). N.Z.

50.—*Forfeiture—Right of holder of miner's right to institute proceedings.*—*Semble*, that any owner of a miner's right may institute proceedings for a forfeiture, and that a Warden has power to decree that a forfeiture shall enure for the benefit of the complainant. *Ching Tong Fong v. Lee Chung*, 1 N.Z.J.R., 139. *Chapman, J.* (1873). N.Z.

51.—*Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 112—Public Trustee—Miner's right.*—The Public Trustee need not be the holder of a

miner's right under sec. 112 of the *Goldfields Act* 1866 (30 Vic. No. 32), in order to entitle him to sue under that Act. *Woodward (Public Trustee) v. Earle*, 2 N.Z.J.R., 12. *Richmond, J.* (1874). N.Z.

52.—**Riparian rights—How common law affected by N.Z. Goldfields Act 1866 (30 Vic. No. 32), sec. 6—Pollution of streams.]—**The common law rights of riparian proprietors are so far abridged by the provisions of the *Goldfields Act* 1866 (30 Vic. No. 32), sec. 6, as to give the holders of miners' rights the power to take, divert and use the water of streams on private lands, subject to regulations made under the Act, but the miners are not entitled to return the water into the stream in a polluted state. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875). N.Z.

53.—**Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 112—Miner's right—Claim.]—***Semble*, that under the *Goldfields Act* 1866 (30 Vic. No. 32), a miner's right is no part of the title to a claim beyond the limits prescribed by sec. 112 of that Act. *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L., 10. N.Z.

54.—**Forfeiture of mining lease—Enforcing forfeiture—Mining Statute 1865.]—**See FORFEITURE, 45.

55.—**Fence—Land sold by Crown—Police Offences Act 1865, sec. 32—Illegal detention.]—**See POLICE OFFENCES ACT.

56.—**Residence of holder.]—**See RESIDENCE.

57.—**Miner's right—Action by holder of, and shareholders in company against manager also a shareholder—Dispute "regarding" partnership—Goldfields Act 1866, sec. 22—Jurisdiction of justices—Costs.]—**See PRACTICE, 119.

58.—**Application for mineral lease—Subsequent proclamation of goldfield—Goldfields Act 1866, sec. 7.]—**See LEASE, 48.

59.—**Goldfield not proclaimed—Goldfields Act 1866, secs. 5, 14—Justices.]—**See GOLDFIELD, 1.

60.—**Right to flowing water—Riparian owners—Mining Act 1874, sec. 15.]—**See WATER, 8.

61.—**Proclamation reserving "unoccupied" land—Land occupied becoming unoccupied—Effect of proclamation—37 Vic. No. 13, sec. 26.]—**See MINING ACT 1874 (N.S.W.)

62.—**New Zealand miner's right—Residence in N.S.W.—Foreign judgment.]—**See PRACTICE, 171.

63.—**Mining lease—Quartz claim—Trespass—Gold Mining Lease Regulations, 28, 33.]—**See LEASE, 57.

64.—**Miner's right—Area that may be occupied under—Difference between, and mineral licenses—Mining Act 1874—Mineral Leases Regulations, 4, 28.]—**See LICENSE, 10.

65.—**Residence area—Sub-letting.]—**See RESIDENCE AREA.

66.—**Easement over Crown lands acquired by miner's right.]—**See EASEMENT.

67.—**Holder of miner's right—Qualification as elector—Signature to election petition.]—**See ELECTION.

68.—**Pegging out land on which tailings are deposited—Part of freehold.]—**SEE TAILINGS, 1.

## MINING ACT 1874 (N.S.W.)

1.—**Share in Mining Claim—Transfer by infant.]—**A contract by an infant to sell and transfer his share in a mining claim cannot be enforced. *Dillon v. Wood*, 2 N.S.W.L.R. (L.), 298. *Martin, C.J., Manning and Windeyer, JJ.* (1881). N.S.W.

2.—**37 Vic. No. 13—Regulation 95—Holder of leasehold—Notice—Evidence.]—**In answer to a question in a case stated by a Warden as to whether regulation 95 of the regulations of December 29th, 1875, was *ultra vires* or not. The Court held that it was not *ultra vires*. *Bailey v. Hidden Treasure G.M. Co.*, 1 N.S.W. W.N., 19. *Martin, C.J., Windeyer and Innes, JJ.* (1884). N.S.W.

3.—**37 Vic. No. 13, sec. 26—Proclamation—Reservation of "unoccupied" land—Land occupied becoming unoccupied—Shifting operation of proclamation.]—**Defendant was in occupation of certain land on a goldfield, where he also had business premises. He afterwards abandoned the land. While he was in occupation a notice appeared in the *Gazette* under sec. 26 of the *Mining Act* "reserving all unoccupied lands within the town and boundaries of Silverton from occupation under business licence or miner's right." When Cooke abandoned the

land Murphy sought to go into possession. The question reserved by the Warden was: Does any portion of land lawfully occupied by virtue of business license or miner's right at the date of the *Gazette* notice, and which land may afterwards become forfeited by any breach of the provisions, &c., of the *Mining Act* of 1874, come within the scope of such *Gazette* notice, or would such notice only apply to land unoccupied at the date thereof? *Per Martin, C.J.*:—"On the whole I am of opinion that the notice had a shifting operation, and that Murphy could not, the land having been 'unoccupied,' go into possession. . . . The intention was that all lands not occupied at any particular time should not be allowed to be taken possession of so long as this proclamation stood." *Faucett and Windeyer, JJ.*, concurred. *Murphy v. Cooke*, 2 N.S.W.W.N., 55. *Martin, C.J.*, *Faucett and Windeyer, JJ.* (1886). N.S.W.

4.—37 Vic. No. 13, secs. 22, 26 (1874)—Proclamation of reserve under sec. 26—Land with area of reserve occupied under business license—Rights of occupier—Renewal.]—A proclamation under sec. 26 of the *Mining Act* 1874, reserving land from occupation under business license, &c., does not operate so as to extinguish the rights of holders of such licenses then in actual occupation of any part of such land. A business license is like an ordinary license, revocable at the will of the grantor, but cannot be revoked until the expiration of the time for which it has been granted. Where such license, in force at the time of such proclamation, is afterwards renewed, the rights of the occupier continue notwithstanding the proclamation. *Wakeham v. Cobham*, 1 A.J.R., 93 (see *PRACTICE*, 466), not followed. *Wilkinson v. Harris*, 9 N.S.W.L.R. (L.), 70; 4 W.N., 159. *Darley, C.J.*, *Windeyer and Foster, JJ.* (1888). N.S.W.

## MINING AGENT

*Goldfields Act* 1866 (N.Z.), (30 Vic. No. 32), sec. 5—Business license—Mining agent.]—The business carried on by a mining agent on the goldfields is not a "business" within the meaning of the *Goldfields Act* 1866 (30 Vic. No. 32). *Inspector of Licenses v. Enright*, 1 N.Z.J.R. (N.S.) M.L., 26. N.Z.

## MINING APPEAL

See *PRACTICE*.

## MINING APPEAL COURT

See *PRACTICE*.

## MINING BOARD

See *BY-LAWS AND REGULATIONS*.

## MINING BOARD REGULATIONS

37 Vic. No. 13—Right to take up more than one claim.]—See *MINER'S RIGHT*, 39.

## MINING DISTRICT

See *COMPANY (WINDING UP)*.

## MINING ENGINEER

*Employer and Employee—Dismissal—Pleading.*]—See *CONTRACT*, 7.

## MINING INTERESTS

*Chattels personal—Mining Act of 1874.*]—*Per Darley, C.J.*, at pp. 39, 40:—"I am of opinion that the 18th section of the *Mining Act* of 1874 was intended to alter the law, and that all interests created by that Act became by virtue of that section personal estate or chattels personal, a term which would apply to a lease of gold mining property or mineral land. It was unnecessary for the section to declare that a lease was a chattel real—it always was so. It was therefore manifestly the intention of the Legislature to alter the law; although possibly more accurate words might have been used,



such as those contained in sec. 20 of the *Companies Act*, and to be found in almost every bank charter or banking Act; but the words used are quite sufficient to carry out what was the manifest intention of the Act." *Williams v. Robinson*, 12 N.S.W.L.R. (E.), 34; 7 W.N., 153 (1890). See *CONTRACT*, 9. N.S.W.

## MINING PARTNERSHIP

See *PARTNERSHIP*.

## MINING LEASE

See *LEASE*.

## MINING REGISTRAR

See *REGISTRAR*.

## MINING SURVEYOR

See *SURVEYOR*.

## MINUTE BOOK

*Companies Act 1864—Evidence—Contents of—Notice in.*—See *COMPANY*, 119.

## MISREPRESENTATION

1. *Water License—Misrepresentation—Cancellation.*—See *LICENSE*, 18.

2. *Repudiation of shares in company—Misrepresentation—Laches.*—See *COMPANY*, 263.

## MISTAKE

See *CLAIM*; *COMPANY*; *FORFEITURE*; *PRACTICE*.

## MORTGAGE

See *COMPANY*; *MINER'S RIGHT*.

1.]—*M.*, the owner of a share in some mining plant, mortgaged it to *P. M.* and his co-shareholders afterwards gave a bill of sale to *B.* over the whole property. *B.* sold to *N.* under the bill of sale. In an action by *P.* against *B.* to recover a portion of the purchase-money: *Held*, that the verdict should be for the defendant, as *B.* had not done anything beyond a mere sale—nothing in the nature of a dispersion or annihilation of the property, whereby the plaintiff was in any worse position as a co-shareholder with *N.*, than as a co-shareholder with *B.* or his mortgagors, the other shareholder of *M.* *Bank of Australasia v. Platt*, 1 W. & W. (L.), 212. Banco (1862). V.

2.]—Under Act No. 109, sec. 28, where the mortgagee was in possession, the mortgage did not require to be registered. *Oriental Bank v. Carter*, 1 W.W. & A'B. (L.), 36. Banco (1864). V.

3.]—The principle "once a mortgage always a mortgage" applies to shares in mining companies, and must be followed, but with such allowances as the character of the case may require. *Niemann v. Weller*, 3 W.W. & A'B. (E.), 125. Full Court (1866). V.

4.—*Bank securities—Scrip deposited.*—A bank may take the scrip of shares in a mining company registered, belonging to a customer, as security for a debt due to the bank by him. And although the bank is not to traffic in the shares, yet it may adopt any measures the law allows to make the most of such securities given in due course of banking business. It is legitimate on the part of the bank, in such a case, to obtain the equity of redemption in an insufficient security. *Harrison v. Smith*, 6 W.W. & A'B. (E.), 182. Full Court (1869). V.

5.]—The Court will not interfere with the exercise of a proper discretion on the part of the bank directory respecting either the management of securities or the mode by which those securities are to be rendered most available. *Ibid.* V.

6.—*Laches—Costs.*—Long neglect on the part of a mortgagor of mining shares in asserting his claim is not a bar to a suit for redemption, but the neglect will disentitle him to costs.



*Bryant v. Saunders*, 2 V.L.R. (E.), 224. *Molesworth, J.* (1876). V.

7.]—Mortgagee of mine working it unsuccessfully but with judgment: *Held*, entitled to expenses of unproductive mining. *United Hand and Band of Hope Co. v. National Bank*, 4 V.L.R. (E.), 173. *Molesworth, J.*, and F.C. (1878). And see S.C., on appeal, 4 App. Cas., 391; 48 L.J.P.C., 50. J.C., *Sir J. W. Colville, Sir Barnes Peacock, Sir M. E. Smith and Sir R. P. Collier* (1879). V.

8. — Mining lease — Mortgagee in possession — Forfeiture of lease — Injury to mortgaged premises.]—A mortgagee of a mining leasehold, in possession, is bound to pay the rent to preserve the property, being entitled to charge the mortgagor therewith. If the property is not worth the rent, he should, at all events, give it up to the mortgagor. Where such a mortgagee had been largely over-paid, and neglected, after decree for redemption, to pay the rent, whereby the lease was forfeited: *Held*, that he was liable to make good to the mortgagor the value of the lease at the date of its forfeiture. *United Hand-in-Hand and Band of Hope Co. v. National Bank*, 6 V.L.R. (E.), 60; 1 A.L.T., 181. *Molesworth, J.* (1880). V.

9.—Mining lease—Appeal—Forfeiture for non-payment of rent — Mortgagee in possession.]—A mortgagee in possession of a mining leasehold paid the rent of it for a time, and then, having written to the mortgagor for advice as to whether it should continue to pay the rent or not, and the mortgagor having declined to advise, discontinued (being then over-paid), and the lease was forfeited. *Held*, upon appeal, affirming *Molesworth, J.*, that the mortgagee was liable to make good to the mortgagor the value of the lease at the time of its forfeiture. *United Hand-in-Hand and Band of Hope Co. v. National Bank*, 6 V.L.R. (E.), 60, 198; 1 A.L.T., 181; 2 A.L.T., 49. *Stawell, C.J., Barry, Stephens and Higinbotham, JJ.* (1880). V.

10 — Fixtures — Maxim, quicquid plantatur solo, solo cedit.]—In the absence of some special arrangement, to which the mortgagee was a party, the mortgagee of land is entitled to the land as he finds it, and no one can enter upon the land to remove anything that has become so affixed to the soil as to form part of the land; and a trade fixture (in this case a Cornish boiler),

annexed to the soil in a quasi-permanent manner passes to the mortgagee (whether of a freehold or a term of years) no matter to whom the chattel belonged before it became so annexed. *In re N.S.W. Co-operative Ice and Cold Storage Co.*, 12 N.S.W.L.R. (E.), 87; 7 W.N., 122. *Manning, J.* (1891). N.S.W.

11.—Mortgagee in possession—Rights of mortgagee to make improvements to keep security alive.]—Plaintiffs, who were Government contractors for the construction of portions of a sewer, mortgaged their plant and assigned their contract to defendants to secure advances. Some time before the completion of the contract, the defendants entered into possession under their mortgage, and themselves carried out the contract to completion. At the time when the contract was made, the way in which the outlet to the sewer was to be finished had not been determined, but subsequently the Government engineer prepared specifications for the outlet works, making considerable variations from and additions to the original contract. This additional contract the defendants undertook and carried out. The plaintiffs brought a suit for an account against the defendants, and the usual decree was made. The evidence showed that if the defendants had not undertaken the additional works they ran a great risk of having the original contract cancelled. The defendants in their accounts included the cost of the additional outlet works, to which the plaintiffs objected as not forming part of the contract they had mortgaged. The Master-in-Equity decided against the contention of the plaintiffs. *Held*, on appeal, affirming the Master's decision, that the defendants, as mortgagees in possession, were justified in undertaking the additional contract, and were entitled to add the cost of the additional works to the principal debt. *Smyth v. Dalgety*, 13 N.S.W. L.R. (E.), 20. *Owen, J.* (1891-2). N.S.W.

12.—Debenture—Floating—Security—Bill of sale—Lien ticket—Goldfields Act 1874 (38 Vic. No. 11), Regulation 38—Foreclosure—Form of order.]—See COMPANY, 405a.

## MUNICIPALITIES

See BY-LAWS AND REGULATIONS; ELECTION; PRACTICE; ROAD.

1.—**Rates.]** — *Held*, that quartz-crushing machinery situate on mines, and used for crushing ore brought from other mines belonging to the owners, or ore belonging to strangers, was not exempt from rates under the Act No. 176, sec. 181. *Davidson v. Stawell Road Board*, 1 W. W. & A.B. (L.), 83. Banco (1864). V.

2.]—Although a municipal corporation may have power to grant permission to mine upon the public streets, the corporation is not absolved from the responsibility cast upon them as managers to take care that the streets are preserved in good order. *Badenhop v. Sandhurst*, 1 W. W. & A.B. (L.), 137. Banco (1864). V.

3.—**Rates — Machinery.]** — A quartz-crushing battery is a necessary adjunct to a mine, and is exempt from rates under the *Municipal Institutions Act* 1863. *Clunes United Q.M. Co. v. Clunes*, 2 W. W. & A.B. (L.), 96. Banco (1865). V.

4.—**Mining Statute 1865, sec. 15 — Mining under streets—Mandamus.]**—When an application under the *Mining Statute* 1865, sec. 16, is made to a municipal corporation for permission to mine under streets, the council must consider the matter, and cannot simply decline to entertain the application. Where the council of a borough refused to consider such a request a rule *nisi* for a *mandamus* was made absolute, requiring them to consider whether mining under the streets could be effected without injury to adjoining property, or injury or obstruction to the streets of the borough or any of them or any part thereof. *Reg. v. Sebastopol, ex parte St. George and Band of Hope U. Co.*, 2 V.R. (L.), 103; 2 A.J.R., 64. Banco (1871). V.

5.—**Rates—Boroughs Statute 1869, sec. 197—Rateable Property — Exemption.]** — Smithies used exclusively by the owners of a mine for the purpose of mending tools and machinery in connection with the mine were rateable under the *Boroughs Statute* 1869. When the whole of a mining property has been rated, including property exempt from being rated, the objection should be taken by way of appeal against the assessment. It is not a defence in a suit for the rates, for in such a suit the Court will not inquire whether the amount is excessive or not.

*Carlisle Co. v. Sandhurst*, 5 A.J.R., 14. Banco (1874). V.

6.—**Local Government Act 1874 (No. 506), sec. 400—Claim—Creek.]**—A person was convicted for interfering with a creek under the charge of a municipality without the consent of the council by virtue of the *Local Government Act* 1874 (No. 506), sec. 400. The creek had been reserved from sale for road purposes, and had been in part improved by the municipality. The defendant had in 1876 taken up a claim on the creek and worked it, which was the alleged offence. *Held*, that as the magistrate had found as a fact that the creek in question had been reserved for public purposes, and had been taken under the management of and used by the council, the conviction could not be quashed. *Reg. v. Walhalla*, 4 V.L.R. (L.), 470. Banco (1878). V.

7.—**Local Government Act 1874 (No. 506), sec. 253—Mining on private property—Exemption from rates.]**—The Court will not recognise as legal mining on private property unauthorised by the Crown. Therefore gold mines on private property worked without license from the Crown are not “mines” exempted from rating by sec. 253 of the *Local Government Act* 1874 (No. 506). *Shannahan v. Crenwick*, 8 V.L.R. (L.), 342; 4 A.L.T., 85. *Stawell, C.J., Higinbotham and Williams, JJ.* (1882). V.

8.—**Local Government Act 1874 (No. 506), sec. 265—Rating value—Auriferous land—Mine.]**—A tenant of the surface of auriferous land, under a lease reserving the minerals and providing that any part of the surface may be resumed for the purpose of working them, is yet liable to be rated upon the whole value of the fee-simple of the land, including the minerals. *Ibid.* V.

9.—**Rateable value of auriferous land.]—Per Stawell, C.J., and Higinbotham, J.:**—In ascertaining the rateable value of auriferous land the owner is not entitled to have the adventitious value, in respect of the chance of getting gold from it, deducted from the capital value of the fee-simple. *Ibid.* V.

10.—**Local Government Act 1874 (No. 506), sec. 253—Rateable property—“Mines”—Building on land held for mining—Exemption from rates.]**—The word “mines” in sec. 253 of the *Local Government Act* 1874 (No. 506), includes all land held as a claim under a miner’s right, or held

under a mining lease; and, therefore, no building upon any part of such land, for whatever purpose used, is rateable property under the Act. *Eaglehawk v. Lady Barkly G. M. Co. and South St. Mungo G.M. Co.*, 11 V.L.R., 593; 7 A.L.T., 72. F.C., *Higinbotham, Williams and Holroyd, JJ.* (1885). V.

11.—Rates—Municipalities Act 1867, secs. 164, 175—Coal mine—Principle of assessment—Finality of appeal.]—In an action for rates, from the assessment of which defendant had appealed under sec. 175 to the justices in Petty Sessions, a verdict was given for plaintiffs. *Held*, on motion to set aside the verdict, that the decision of the justices would have been final if they had given a decision; but, as they had refused to go into the question of principle, they had virtually not decided. *Held*, also, that the valuers had proceeded on a right principle, but that they were wrong in considering only the extent of the workings of a coal mine, which was partly within and partly without the municipality, instead of taking into account the quantity of coal actually extracted in the municipality. Verdict reduced accordingly (*Hargrave, J.*, who thought the case ought to be sent back to the valuers, *diss.*) *Waratah v. Waratah Co.*, 2 N.S.W. S.C.R. N.S. (L.), 167 (n); N.S.W. Digest (1862-84), p. 619. *Sydney Morning Herald*, Dec. 9th, 1874. *Martin, C.J., Faucett and Hargrave, JJ.* N.S.W.

12.—Rates—Municipalities Act—Assessment—Coal mines—Railways.]—Railways and coal mines are rateable under secs. 163 and 164 of the *Municipalities Act* 1867 (31 Vic. No. 12). The plaintiffs rated by three separate assessments two coal pits and a railway of the defendants. The rate on the coal pits was calculated on the basis of a royalty on the amount of coal taken out during the preceding year. The land on which the pits and railway were situated was the defendant's freehold, and in their occupation, and was not let. Part of such lands and the buildings thereon had been separately rated and the rates paid. The defendants appealed from the rate to the Court of Petty Sessions, and the rate was upheld. An action was then brought by the plaintiffs in the District Court to recover the rates. The District Court judge held that the decision of the justices was final. On appeal: *Held*, first, that coal mines and railways are rateable under the Act; and, secondly,

that the justices had jurisdiction to decide upon the question of the legality of the rates, and that their decision was final. *Quære*, whether the rates upon three different portions of the same property should have been separately assessed? *Hamilton v. Australian Agricultural Co.*, 2 N.S.W.S.C.R. N.S. (L.), 158. *Faucett and Manning, JJ.* (1879). N.S.W.

13.—By-laws—Church and school lands—Blasting—Prerogative of the Crown.]—The borough of R. passed a by-law providing that any person desirous of blasting within the distance of 150 feet of any road should give twenty-four hours' notice to the council, and that the council might either prohibit such, or appoint a time when the same might take place. N., who held a permit from the Minister under sec. 13 of the *Church and School Lands Dedication Act* 1880 (44 Vic. No. 19), authorising him to quarry on church and school lands, was convicted under the above by-law for blasting on such lands within the distance of 150 feet of a public road in the borough without having given the required notice. *Held*, on motion to make absolute a rule *nisi* for a prohibition, that N. was properly convicted. *Quære*, whether a municipality could prohibit blasting altogether in such lands. Lands, though vested in the Crown, may be subject to the by-laws of a municipality. *Ex parte O'Neill*, 13 N.S.W.L.R. (L.), 280. *Darley, C.J., Innes and Stephen, JJ.* (1892). N.S.W.

14.—Municipalities Act 1867, secs. 52, 54 Schedule D.—Municipal roll—Mining company—Manager—Occupier.]—The manager of a mining company is not entitled to vote on behalf of the company if his name appears on the roll as manager and not as occupier of the company's land. *Ex parte Gale*, 7 N.S.W.W.N., 93 (1891), distinguished. *Per Darley, C.J.*:—"The *Municipalities Act* was passed in 1867, at which time there were very few of these mining companies in existence, and for that reason probably this matter was overlooked. Thence there is no provision enabling mining companies to be represented on the electoral rolls, although they pay rates." *Ex parte Travers*, 14 N.S.W.L.R. (L.), 329. *Darley, C.J., Stephen and Foster, JJ.* (1893). N.S.W.

15.—Rates—Hunter District Water Supply and Sewerage Act 1892, secs. 35, 90, 129—What lands liable to be rated.]—The words in sec. 35, subsec. 6, of Act 55 Vic. No. 27, which make "land

. . . distant not more than sixty yards from any main" liable to be rated, do not mean that all the land under one holding, any portion of which is distant not more than sixty yards from any main, is liable to be rated, but mean that only that portion of the land which is actually within sixty yards of a main is liable to be rated. *Hunter District Water Supply and Sewerage Board v. Newcastle Wallsend Coal Co.* (1896), A.C., 82; 65 L.J.P.C., 1; 73 L.T., 541; 17 N.S.W.L.R. (L.), 1. J.C., *Lords Hobhouse, Macnaghten and Morris*, and *Sir Richard Couch* (1895). N.S.W.

16.—Rating Act 1882 (N.Z.)—Occupier—Right to mine.]—A company having a right to mine under a section of land, but only having a right to occupy a small portion of the surface, cannot be rated as occupier of the whole section. *Walton Park Coal Co. v. Taieri*, N.Z.L.R. 3 S.C., 315. N.Z.

## NEGLIGENCE

See EMPLOYER AND EMPLOYE; MACHINERY.

1.—Regulation of Mines Statute 1873, sec. 8—Regulation of Mines Statute 1878—Contributory negligence—Negligence of fellow workman.]—In an action for negligence framed on the *Regulation of Mines Statute* 1873, sec. 8, the word "mine" was held to be not applicable to a drive which had absolutely ceased to be used for any of the purposes mentioned in sec. 2 of the Statute. But see *Regulation of Mines Statute* 1877. When such action is based on non-observance of the provisions of the Act contributory negligence affords no defence, *aliter* when the action is for the negligence of a fellow workman. *Laurenson v. Count Bismarck G.M. Co.*, 4 V.L.R. (L.), 87. Banco (1878). V.

2.—Negligence—Regulation of Mines Statute 1877, secs. 6, 11, 16—Person in charge of machinery—Erection of machinery.]—The above enactment, as to negligence of persons in charge of machinery in connection with the working of a mine, does not apply to the erection of machinery at a mine. *Dunstan v. Stewart*, 6 V.L.R. (L.), 175. Banco (1880). V.

3.—Regulation of Mines Act 1877 (No. 583), secs. 6, 12—Negligence—Mining accident—Contributory negligence.]—Where the plaintiff, a

miner, was injured by the fall of a piece of timber placed in the sides of the shaft of the defendant's mine to keep the pump tube secure, the fact that the plaintiff had for some time been aware that it was loose, and had not notified it to the manager or anyone else in authority, is not such conclusive evidence of contributory negligence on his part as to justify the withdrawal of the question from the jury. *Litton v. Thornton*, 7 V.L.R. (L.), 4, commented on. *Eureka Extended Co. v. Allen*, 9 V.L.R. (L.), 341. *Stowell, C.J.*, and *Williams, J.* (1883). V.

4.—Mines Regulation Act 1889 (53 Vic. No. 7), secs. 18, 26—Person killed in a mine—Right to recover compensation—Person entitled to sue—Personal representatives—Accident in a mine—Neglect—Mine-owner as insurer—Prima facie evidence of negligence.]—The words "personal representatives" in sec. 26 of the *Mines Regulation Act* 1889, mean legal personal representatives, and no person other than the executor or administrator of the person killed can recover compensation under that section. *Per curiam*:—Any event out of the ordinary course happening in a mine which itself causes or is likely to cause injury is an "accident" within the meaning of sec. 18 of that Act. *Per Griffith, C.J.*:—"I am disposed to think that the Act puts the mine-owner in the position that he insures the persons who are working in the mine, that they shall not suffer any injury from his carelessness, or the carelessness of his agents." *Per Griffith, C.J.*:—"When it is laid down that certain facts shall be *prima facie* evidence of negligence, I think that means that if no more evidence is adduced, negligence might be inferred." *Eaton v. Caledonian United and New Zealand G.M. Co.*, 8 Q.L.J., 3. *Griffith, C.J.*, *Cooper and Real, JJ.* (1897). Q.

## NEW TRIAL

See PRACTICE.

## NO LIABILITY COMPANY

See COMPANY.

1.—No Liability Mining Companies Act 1881 (44 Vic. No. 23), sec. 9—Petition to dissolve—

**Affidavit verifying same—Practice.]**—A petition for dissolution under sec. 9 of the *No Liability Mining Companies Act* must be verified by affidavit that the necessary preliminary steps have been taken. *In re Breadalbane G.M. Co.*, 2 N.S.W.B.C., 9. *Owen, J.* (1891). N.S.W.

**2.—No Liability Mining Companies Act 1881 (44 Vic. No. 23), sec. 9—Dissolution—Resolution that company be wound up.]**—In order to dissolve a company under the *No Liability Mining Companies Act*, the resolution passed must be one to dissolve the company, and not one to wind it up. *In re Breadalbane G.M. Co.*, 2 N.S.W.B.C., 9. *Owen, J.* (1891). N.S.W.

**3. — No-liability company — Service on — No Liability Companies Act 1881 (44 Vic. No. 23), sec. 17.]**—A no-liability company, whose registered office was in Sydney, was served with a summons under the *Masters and Servants Act* by leaving it with the secretary of the company at Blayney. *Held*, that the service was bad as not being effected in the way prescribed by sec. 17 of the *No Liability Companies Act* 1891. *In re Brown's Creek G.M. Co.*, 2 N.S.W.B.C., 10. *Stephen, J.* (1891). N.S.W.

**4.—No Liability Mining Companies Act 1881 (44 Vic. No. 23), sec. 6—Company registered in New South Wales—Mines in another colony—Liability of directors.]**—A company registered under the *No Liability Mining Companies Act* 1871, cannot hold land for mining in another colony, and directors of such a company so holding land are personally liable on contracts entered into by them, and on behalf of the company. *MacKenzie v. Scott*, 2 N.S.W.B.C., 94. *Gibson, D.C.J.* (1892). N.S.W.

**5.—Companies Act 1874 (37 Vic. No. 19), secs. 36 (7), 248—No Liability Mining Companies Act 1881 (44 Vic. No. 23), sec. 7—No-liability company — Winding up under Companies Act — Directors' fees — Proof of debt — Priorities of debts.]**—See *New Baker's Creek North G.M. Co. (Conder's Case)*, 5 N.S.W.B.C., 37 (1894).

N.S.W.

**6.—Winding up of no-liability company under Companies Act (37 Vic. No. 19), sec. 243.]**—See *In re Lady Carrington G.M. Co.*, 1 N.S.W.B.C., 103. *Manning, J.* (1891), followed in *In re Brown's Creek G.M. Co.*, 14 N.S.W.L.R. (E.), 24; 3 B.C., 85. *Manning, J.* (1892), (see COMPANY, 371). But see *Re Collingwood Q.M. Co.*,

5 W.W. and A'B. (E.), 190. *Molenworth, J.* (1868), (see COMPANY, 305).

**7. — Mining Companies Act 1871 (Vic.), (No. 409), sec. 118 (1) — No-liability company — Incorporation—Non-payment of capital up to 5 per cent before registration — Conclusive effect of certificate.]**—See COMPANY, 122, 123, 124; REGISTRATION, 13.

## NON-JOINDER

See PRACTICE.

## NOTICE

See CLAIM, 17; COMPANY, 2, 15, 21, 26, 28, 34, 35, 38, 66, 75, 103, 105, 107, 129, 188, 202, 210, 211, 257, 259, 260, 315, 335, 336, 344, 345, 347, 384b; FORFEITURE, 47; LEASE, 35, 36; LICENSE, 4; MINING ACT 1874, 2; PRACTICE, 77; PRIVATE PROPERTY.

## NUISANCE

See WATER.

**1.]**—A person who uses or exercises control over anything, or permits the existence of any nuisance, is bound to adopt such measures as will prevent injury to others. *Bonshaw Co. v. Prince of Wales Co.*, 5 W.W. & A'B. (E.), 140. Full Court (1868). V.

**2.]**—Miners on Crown lands are not justified in allowing a nuisance to continue which would injure the owners of private property. *Ibid.* A.R., 13th Dec., 1867. V.

## NULLITY

See COMPANY.

## NULLUM TEMPUS ACT

See CROWN; POSSESSION.

**OBJECTS OF COMPANY***See COMPANY.***OCCUPATION***See MINER'S RIGHT, 33; RESIDENCE AREA, 19; PRACTICE, 236.***OCCUPATION LICENSE***See LICENSE, 21.***OCCUPIER***See MUNICIPALITIES; MINING ACT 1874.***OFFICE***See COMPANY; PRACTICE.***OFFICIAL AGENT***See COMPANY.***ORDER***See COMPANY; PRACTICE.***ORDERS***Documents signed by captain and purser of mine and addressed to secretary—Notice of dishonour.]—See BILL OF EXCHANGE, 3.***ORE***See GOLD.***PARK***See CROWN LANDS.***PART PERFORMANCE***See CONTRACT***PARTIES***See PRACTICE.***PARTITION**

**Partition—Deed of—Parcels—General words—Intention of parties—Injunction.]—M.** having acquired by possession a title to ten acres of land, devised all his property to his trustees on the trusts of his will. The beneficiaries entered into an agreement for partition, by which "the properties at the North Shore, Newcastle, known as Stockton and the Stockton Farm," were to form the share of M.'s daughter. By a subsequent deed, two parcels of land in the same parish, and adjoining the piece of ten acres, were conveyed to S. as trustee for the said daughter of M. The deed contained no general words, and did not mention the piece of land of ten acres. The plaintiffs (who prayed for an injunction to restrain the defendants from boring for coal and sinking shafts on certain lands), claimed to be entitled to the ten acres under a lease from the trustees, who were appointed to succeed S. as trustee for M.'s said daughter. *Held*, that the trustees had no estate in the ten acres under the deed of partition to pass the lease. *Held*, also, that there was not sufficient evidence to justify the Court in holding that the deed of partition did not represent the intentions of the parties as expressed in the agreement. Decision of *Manning, J.*, over-ruled. *Stockton Coal M. Co. v. Fletcher*, 9 N.S.W.L.R. (E.), 66. *Faucett, Innes and Deffel, JJ.* (1888), upheld by J.C., *Lords Hobhouse, Macnaghten, Field and Hannen*, and *Mr. (Lord) Shand*, 12 N.S.W.L.R. (E.), 264 (1891). N.S.W.

## PARTNERSHIP

See BY-LAWS AND REGULATIONS; CLAIM; COMPANY; FRAUD; LEASE; MINER'S RIGHT; PRACTICE (APPEAL); PRIVATE PROPERTY; TRUSTS.

1.—*Laches*.]—K. was a partner with others in a mine. In May, 1859, he attended a meeting of the partnership; he said he would not pay towards making a shaft which his partners proposed to sink. He did not further interfere with or pay into the mine until in 1860 it became suddenly valuable, when he claimed his interest. His partners resisted his claim on the ground that he had forfeited or abandoned his shares. *Held*, that K. had not been guilty of such *laches* as amounted to an abandonment of his shares, and that he was entitled to his interest in the ground. *Heine v. Kleine*, A.R., 22nd March, 1861. V.

2.—*Undivided share*.]—An undivided share (Act No. 32, sec. 77), in a claim means a share with others, to work the claim with them, for the common purpose of dividing the proceeds as partners. *Kin Sing v. Won Paw*, 1 W. & W. (L.), 303. Banco (1862). V.

3.—*Dissolution—Estoppel*.]—The mere circumstance of the defendants refusing to acknowledge the plaintiff as their partner (no time being specified for the continuance of the partnership), does not necessarily operate as a dissolution. *Ibid*. V.

4.]—A decision in the Warden's Court as to partnership between parties is, if not appealed from, conclusive, and may be given in evidence as binding in a suit between the same parties in the Court of Mines. *Ibid*. V.

5.—*Mining partnership*.]—A partnership for the purpose of quartz crushing was held to be a mining partnership, under the Act No. 32; and a suit arising out of such a partnership was held to be a matter cognizable by the Court of Mines, provided the partnership was limited to a goldfield, as defined by the Act. *Harvey v. Rodda*, 1 W.W. & A'B. (L.), 21. Banco (1864). V.

6.—*Liability of partners at law*.]—M. and O. were partners in an unregistered mining company. At a meeting of the members it was agreed that certain work should be done on the claim, and M. was then engaged at a certain

wage to do it; O. was appointed to manage the claim. M. did the work, and sued O., as one of the partnership, for his wages. *Held*, that M., being one of the partners, could not sue his co-partner at law. *Oliver v. Meehan*, A.R., 29th March, 1865. V.

7.—*Exclusion of partner from registered company*.]—Where some of the owners of a mining claim agreed with the owners of another claim to amalgamate the mines and form a company under the Act No. 228, excluding one of their partners, the person so excluded has no right to sue the incorporated company in equity, praying to be declared a partner and entitled to shares. He has a right to sue for his share of the ground. He may have some case against his co-shareholders for having appropriated his property as theirs in the amalgamation. *Parle v. Harp of Erin Amalgamated Quartz and Crushing Co. Regd.*, 3 W.W. & A'B. (E.), 98. *Moleworth, J.* (1866). V.

8.—*Partner lying by*.]—A partner resigning his share in a claim, and lying by for nine years, was held to be debarred by his negligence from asserting rights to such share. *Cohn v. Heine*, A.R., 1st Nov., 1867. V.

9.—*Partner enforcing forfeiture*.]—“We cannot say that any principle of equity is actually violated by one of several shareholders endeavouring to forfeit, for his own personal benefit, a mine, the working whereof formed the subject matter of the association; but a shareholder ought in that, as in all other acts, to treat all his co-shareholders alike, whether that treatment be amicable or hostile. He cannot be permitted to deal with one shareholder as if he was still his partner in the undertaking and with another as if he was not.”—*Per Stawell, C.J. Harrison v. Smith*, 6 W. W. & A'B. (E.), at p. 212. V.

10.—*Trustees—Amendment—Parties*.]—R. and M. agreed to become partners in certain auriferous ground, and that M. should obtain a lease of it in his name. M. obtained the lease. R. discovered that M. was selling interests in the ground in excess of his proportion. R. instituted a suit in a Court of Mines to establish the partnership and to restrain M. from selling more than his half. At the hearing it appeared that M., unknown to R., had also taken up the ground as a claim, and divided it in the names

of two companies in which he sold shares. The judge amended the plaint setting forth the facts as to the claims, and decreed that M. was a trustee for the original partnership. *Held*, on appeal, that it was competent for the judge to amend as he had done, and that the plaint was not, as contended, defective for want of parties, viz., the persons to whom M. had contracted to sell; for if such contracts were complete and valid R. could only recover against M., and if not completed they did not affect the case. *Miller v. Rigby*, 2 V.R. (M.), 32; 2 A.J.R., 134. *Molesworth, J.* (1871). V.

11.—Act No. 324, sec. 9.—Unregistered partnerships—Agreement—Authority.]—Notwithstanding Act No. 324, sec. 9, partners for mining purposes not registered are, as to adjusting accounts between themselves, liable for expenditure incurred by other partners with sufficient authority from them, though there may be no written evidence of that authority. The direct object of the clause was to protect a partner from an action by a stranger with whom another partner had contracted on behalf of the partnership, unless the particular defendant assented to the contract in writing. *Allardyce v. Cunningham*, 5 A.J.R., 162. *Molesworth, J.* (1874). V.

12.]—Participation of profits in exchange for labour in a mine does not of itself constitute a partnership. *United Hand and Band of Hope Co. v. National Bank*, 4 V.L.R. (E.), 173 (1878); *Meldrum v. Atkinson*, 5 V.L.R. (E.), 154. *Molesworth, J.* (1879). V.

13.—Warden—Court of Mines—Jurisdiction—Crown Lands—Act No. 291, sec. 177.]—W., by plaint before a Warden, sued the Pride of the East Mining Company for money due to him from a mining adventure in which both were engaged. The adventure in question was on private, not Crown lands. The Warden decided for the complainant. The company appealed to the Court of Mines. *Held*, that the Warden had no jurisdiction to hear the complaint, as the Act (No. 291, sec. 177) is restricted to Crown lands, and that the Court of Mines had jurisdiction to hear the appeal and reverse the order. *Pride of the East G.M. Co. v. Wimmer*, 5 V.L.R. (M.), 9. *Molesworth, J.* (1879). V.

14.—Companies (Mining) Act 1867 (No. 324), sec. 9.—Unregistered partnership—Liability of

members.]—*Semble*, no action can be brought against a member of an unregistered partnership for mining purposes upon a simple contract made by or with any other member of such partnership on behalf of the same, unless such contract or a memorandum thereof be in writing and signed by the member sought to be charged. *Ex parte Kitchingman*, 6 A.L.T., 256. F.C., *Higinbotham, Williams and Holroyd, JJ.* (1885). V.

15.—Forfeiture of share in co-operative mining partnership—Jurisdiction of Warden.]—Where a by-law was made in pursuance of the power conferred by sec. 106, sub-sec. 7 of the *Mines Act* 1890 (No. 1120), for determining "the events upon which a share in a claim shall be forfeitable": *Held*, that a Warden had no jurisdiction to hear and determine a complaint, brought under the by-law, claiming a declaration that the defendant's share in a co-operative mining partnership was forfeitable, and that the Warden's jurisdiction under the by-law was limited to determining the forfeiture of a share in a claim. *Boyd v. Hayes*, 18 A.L.T., 80; 2 A.L.R., 229. *Hood, J.* (1896). V.

16.—Working mineral lands—Agreement to consign auriferous quartz—To keep leases valid.]—By agreement between A., who was entitled as equitable assignee of C. to the benefit of certain mineral discoveries with power to dispose of them, and B., who held a lease of auriferous lands for twenty-one years, subject to a certain payment and conditions against assigning without a license, it was agreed that B. would, when required, assign an individual moiety of the leased lands to A.; and in the meantime subject to performance by A. of his part of the contract stand possessed of such moiety for A.'s benefit; that he would perform the lessee's covenants and keep the lease valid and effectual, and would consign to A.'s order in London, auriferous quartz raised from the lands in quantities not less than five tons at a time, in the proportion of one ton to every £25 remitted by A. And A. agreed that when required he would assign to B. an undivided tenth share of the said discoveries, and subject to the performance by B. of his contract would stand possessed of that share for B.'s benefit and do what was necessary to prevent any forfeiture; and further to enable B. to raise and consign the gold ore to A., would remit to B., within six months, not less than



£250, and would, on the receipt of any consignments from A., cause them to be realised, and after deducting the expenses of realising pay a moiety to B. There was a proviso for terminating the agreement if the £250 was not remitted within six months; and also a stipulation authorising A. to get up a company for working the mines, B. undertaking, upon certain conditions, to assign the company the remaining moiety. A. sent the £250. *Held*, that an action would lie against B. for not keeping the lease valid, and for not consigning to A. auriferous quartz according to the agreement. *Radley v. Moffat*, 1 N.S.W.S.C.R. (L.), 112. *Stephen, C.J.*, and *Wise, J.* (1862). N.S.W.

17.—*Partnership—What constitutes—Joint contributors.*—In a case in which there were eight plaintiffs, it appeared that the plaintiffs and the defendant put into a common fund £180 (£20 a piece), out of which it was agreed that the defendant should receive 100 guineas for his trouble in examining and reporting upon a quartz reef, and 50 guineas for his expenses. If the report was favourable, the plaintiffs, the defendant, and A. were to work the reef in partnership. The defendant received the 150 guineas, but neither made a report nor inspected the mine. *Held*, that the plaintiffs being joint contributors with the defendant, could not sue him to recover back the 150 guineas or any part thereof. *Harbottle v. Hargraves*, 5 N.S.W.S.C.R. (L.), 104. *Stephen, C.J.*, *Cheek and Faucett, JJ.* (1866). N.S.W.

18.—*Deed of settlement—Not Signed—Director—Estoppel—Winding up.*—M. attended a meeting for the forming of the C.H.C. Mining Company Limited, where he proposed and seconded resolutions, and was elected a director of the company, and as such his name was afterwards inserted in the deed of settlement. That deed M. never executed. He acted as a director, received fees for his attendance, signed cheques to defray the expenses, and as chairman of the board he signed the minutes making the first call. Further, upon 1000 shares he paid the allotment money, and also paid the first two calls in respect of the said shares. He refused to pay a third call, and the company, by their manager, sued him therefor, charging him as being the holder of 1000 shares and indebted to the company in respect of the calls thereon, to which he had become liable in terms of the deed

of settlement. *Held*—(1.) That M. was not estopped from alleging and proving that he had not executed the deed of settlement; and (2.) That as he had not executed the deed he was not liable to be sued under its provisions. *Davis v. Montefiore*, 12 N.S.W.S.C.R. (L.), 26. *Martin, C.J.*, *Hargrave and Faucett, JJ.* (1873).

N.S.W.

19.—*Partnership—For mining purposes—Unregistered—Covenant to pay calls—Action.*—Shareholders in an association formed for mining purposes, but which was neither registered nor incorporated, covenanted (*inter alia*) to pay all calls, and in default of payment the directors were empowered to sue for, and recover, the amount of such calls. Upon that covenant a shareholder was sued for calls unpaid. *Held* (*Hargrave, J., diss.*), that the action would not lie, as by the deed an attempt was made to enable certain of the partners in a company to sue their co-partners at law for money, which, when recovered, would be partnership property. *Hybart v. Parker*, 4 C.B.N.S., 209, followed. *Gordon v. Gibbons*, 12 N.S.W.S.C.R. (L.), 40. *Martin, C.J.*, *Hargrave and Cheeke, JJ.* (1873). N.S.W.

20.—*Colliery estate—Sale by tenant in common—Partnership liability.*—Prior to August, 1873, A. and B. were the registered proprietors as tenants in common in fee simple under the provisions of the *Real Property Act*, subject to a mortgage to one T.W., of certain lands known as the New Lambton Colliery Estate, which together with the necessary machinery and plant for working the same had been purchased and acquired by them with partnership moneys, and which at the time of B.'s contract with C., hereafter mentioned, was being worked by A. and B. under a partnership agreement as "a going concern." C., at the time of his said contract with B., was, and had for some time been, the confidential clerk and manager of the partnership business, and as such was cognisant of all its affairs, and there were then certain current contracts, including a contract for the supply of coal to the E. & A. Coal and Copper Company, which was an onerous one, inasmuch as the selling price of coal was considerably in advance of the price at which the coal was contracted to be supplied to the company. A. had also devoted and expended much of his time, energy and capital, and given all the benefit of long established com-

mercial relations, and undertaken large financial responsibilities in working the mine and developing the trade for the sale of coal therefrom. In August, 1873, C. purchased from B. his moiety of the lands and machinery, and B. having refused to perform this contract, C. filed a bill for specific performance. It was ultimately decreed that the contract should be specifically performed, and B. afterwards, on the 6th March, 1875, in pursuance of the said decree, delivered possession of his moiety of the said lands and machinery to C. In a decree on further directions in the said suit for specific performance between C. and B., it was ordered that all parties should do and execute all proper conveyances, bonds and assurances; and that B. should convey and assign to C., his heirs, executors, administrators and assigns by all proper deeds and assurances, the proper moiety of the said mine, with machinery, plant and appliances of all kinds attached to and belonging to it. C. had not obtained any transfer of B.'s interest as ordered. In a suit in which C. and his two brothers (who claimed to be interested in C.'s share), were plaintiffs, and in which B. and the executors of A. were defendants: *Held* (upholding the decree of the primary judge), that the plaintiff C. should obtain from the defendant B. a transfer of his moiety of the said mine, plant, machinery and other property. *Held*, also, that the plaintiff C. should do and execute all such deeds, bonds, matters and things requisite for protecting the defendants against one moiety of the responsibilities under the contract with the E. & A. Coal and Copper Company. *Held*, also, that upon the plaintiff C. obtaining such transfer, and executing and doing all such deeds, bonds, matters and things, the defendants, the executors of A., were entitled to an inquiry as to what amount was a just allowance, and compensation to be made and paid by the plaintiffs to the said defendants as such executors as aforesaid, in respect of the time, money and expense laid out and employed, and the risks run, and responsibilities incurred by A. in the making of the said mine, and the development of the said trade for the sale of coal therefrom, and in conducting the said business of and in connection with the said colliery. One of C.'s brothers, D., on behalf of himself and brothers, procured an assignment from T.W. of his mortgage security, and without notice to A. *Held*, in a suit by the executors of A. against C. and his two brothers, that inasmuch as it had appeared to the Court that

D. was jointly interested with C. in the purchase of B.'s share, he ought not to be treated as an independent assignee of the mortgage to T.W. *Dibbs v. Brown, Brown v. Dibbs*, 1 N.S.W.L.R. (E.), 65. *Hargrave, Faucett and Windeyer, JJ.* (1890). N.S.W.

**21.—Parol agreement—"Syndicate"—Mineral lease—Promoters.]**—"The term 'syndicate' has of recent years come into vogue, and has to a certain extent acquired a definite meaning, which, as far as I can understand, is 'a combination of men working together for a common object.' In some cases, no doubt, syndicates are formed not for the purpose of carrying on any business themselves, but for the purpose of acquiring property and forming a company for the purpose of working the property or business so acquired. In such case the syndicate would be nothing more than the promoters of a company, and it has been held that promoters of a company are not partners amongst themselves; but in this case the syndicate as alleged and proved is not for the purpose of taking up the land and floating a company to work it, but to work it themselves for their own profit. If that be so, then it appears to me that there is no distinction between such a syndicate and a partnership. It is a partnership to take up and work a mineral lease, share the expenses of working it and divide the profits. In other words it has all the essentials of a partnership." — *Per Owen, J.*, at p. 36. *Williams v. Robinson*, 12 N.S.W.L.R. (E.), 34; 7 W.N., 153 (1890). See *CONTRACT*, 9.

N.S.W.

**22.—Co-ownership—Mining partnerships.]**—"It was contended that this arrangement between the parties to this suit was an arrangement for co-ownership, and not for a partnership; but in all cases of mines, at any rate from the time of Lord Hardwick, it has been held that in mining partnerships, although there may be co-ownerships also, they must be treated as partnerships in trade, with this peculiarity, that the parties are allowed to dispose of their interests without dissolving the partnership, or without obtaining the consent of their co-partners."—*Per Owen, J.*, at p. 37. *Williams v. Robinson*, 12 N.S.W.L.R. (E.), 34; 7 W.N., 153. (1890). N.S.W.

**23.—Forfeiture of partner's share—Partnership agreement—Voting by proxy—Form of proxy.]**—The plaintiff was the owner of certain

mineral leases and had entered into an agreement of partnership with the seven defendants under the name of the "Tate River Tin Sluicing Company," to work these leases. The partnership agreement contained provisions:—

(1.) That the general business of the partnership should be conducted by the several partners.

(2.) That at any meeting of the partnership, four members present in person or by proxy should form a quorum.

(3.) That all matters whatsoever connected with the partnership business should be decided by a majority of votes represented by the partners present in person or by proxy.

(4.) That if any partner failed to pay a call duly made in accordance with the provisions of the partnership agreement, his share, after certain formalities, should be liable to forfeiture by the partnership. A call having been made, one of the partners failed to pay the same, and after the requisite formalities had been taken, a meeting of the partnership was called, and the shares of the defaulting partner were declared forfeited. The partnership consisted of eight persons altogether, but at the meeting there were only three partners present in person, one of whom stated that he held proxies for three others. These proxies were in this form:—

"Power of Attorney. I, A.B., do hereby authorise C.D. to act as my agent, and I agree that all and whatsoever the said C.D. shall lawfully do under this power in connection with the partnership, I will at all times ratify and confirm as good and valid." The partner whose shares were declared forfeited brought a suit for relief from forfeiture. *Held*, that as the forfeiture of a partner's share was a matter distinct from the general business of the partnership, the provisions in the partnership agreement with regard to proxies did not apply to a meeting called for the object of declaring such forfeiture. *Held*, also, that assuming the provisions with regard to proxies did apply to such a meeting, the so-called "powers of attorney" were not "proxies" within the meaning of the partnership agreement. *Sheldon v. Phillips*, 15 N.S.W.L.R. (E.), 98. *Owen, J.* (1894). N.S.W.

**24.—Agreement—Proxy—Vote.**—[The word 'proxy' means only 'substitute' or 'person acting by procuration,' and the appointment of a proxy may not require any particular form, but I think it ought to be a special appointment for a definite purpose, and to express the busi-

ness or matter in respect of which the proxy is to act for the principal—that is to say, if it is a proxy to vote the document appointing the proxy ought to express that the proxy is to vote for the principal at a particular meeting, or at all meetings for a specified time, or for a particular purpose, or to express in some definite form the matters in respect of which the proxy is to act."—*Per Owen, J.*, at pp. 103-4. *Sheldon v. Phillips*, 15 N.S.W.L.R. (E.), 98. (1894). N.S.W.

**24a.—Mining Partnerships Act 1861 (24 Vic. No. 21), secs. 6, 13—Mining Partnerships Act 1861 Amendment Act (34 Vic. No. 16), sec. 3—Companies Act 1874 (37 Vic. No. 19), secs. 3, 244—Increase of capital—Limitation of liability on shares of new issue—Contributory—Illegal association—Estoppel.**—[See *In re New South Wales Co-operative G.M. Co. (Tarcutta Ltd.)*, 6 N.S.W.B.C., 61 (1896). N.S.W.]

**25.—Statute of Frauds, sec. 4—Mining Partnership—Parol agreement.**—[A., B. and C. agreed to form a partnership to send C. to West Australia to prospect for gold, and to contribute funds for his support while there; all finds to be the property of the partnership. *Held*, that the agreement did not require to be in writing under sec. 4 of the *Statute of Frauds*. *Forster v. Hale*, 5 Ves., 308, followed. *Caddick v. Skidmore*, 2 De G. & J., 52, distinguished. *Kennedy v. Currie*, 17 N.S.W.L.R. (E.), 28; 12 W.N., 105. *Owen, J.* (1896). See also *Williams v. Robinson*, 12 N.S.W.L.R. (E.), 34; 7 W.N., 153; *supra*. N.S.W.]

**25a.—Co-owners in mining properties—Partners—Trustees.**—[Co-owners in mining properties are not *ipso facto* either partners or co-trustees one for the other, although under special circumstances such relations frequently and constantly arise. *Little v. McDonald*, 1 Q.L.J., 124. *Harling, A.C.J.* (1883). Q.]

**25b.—Unwritten contract to admit as partner—Interest in mining lands—Statute of Frauds.**—[Where partners in a mining concern possess property partly freehold and partly leasehold, which they hold in common and use for partnership purposes and not as an asset, the share of each partner is real and not personal estate, and any agreement in respect to admitting another partner in the venture must be in writing, the subject matter being an "interest in land"

within the meaning of the *Statute of Frauds*. *Steward v. Blakeaway*, L.R. 6 Eq., 479; 4 Ch., 600, approved. *Meyenberg v. Pattison*, 3 Q.L.J., 184. F.C., judgment delivered by *Chubb, J.* (1889). Q.

**25c.—Contract to admit as partner—Declaration of trust—Evidence as to.**—See *Meyenberg v. Pattison*, 3 Q.L.J., 184. F.C. (1889). Q.

**26.—Allegations of fraud not proved—Dismissal of claim—Right to file new claim.**—(1.) A plaintiff claiming partnership account and participation of profits (in a mining venture) who alleges fraud must prove fraud. (2.) In such a case if fraud be not proved the whole claim must be dismissed. *Semle*, a fresh claim not alleging fraud may be filed. *Bagot v. Scammell*, 22 S.A.L.R., 15. *Boucaut, J.* (1888). S.A.

**27.—Partnership—Rights of absent partner—Collusive registration by remaining partners—Abandonment of share—Dissolution of partnership.**—A mining partner who absents himself from the partnership claim, but without the intention of abandonment, cannot be deprived of his share by the remaining partners merely obtaining an order for possession from the Warden. One partner cannot "jump" another partner's share. A partner in a claim can only be got rid of, against his will, by a dissolution. But a partner may abandon his share, and where he refuses to take the risks of the adventure, and leads his partners to believe that he has abandoned, dishonestly intending to return afterwards, and, if profits are realised, to set up a claim to them, this may be justly treated as equivalent to abandonment. *Smith v. O'Donoghue*, 1 N.Z.J.R. (N.S.) M.L., 1. N.Z.

**28. — Abandonment — Re-taking of claim by one partner.**—Where two miners working in partnership at a claim abandon it for two years, and cease to work as partners, one of the partners may obtain a fresh certificate for the work, and work it independently of the rights of the former partnership. *McKinnon v. Collie*, N.Z.L.R. 4 S.C., 298. *Williams, J.* (1886). N.Z.

**29.—Partnership—Abandonment — Re-taking of claim by one partner—Re-hearing.**—Where a former partner has obtained a fresh certificate of an abandoned claim, and the time for applying for a re-hearing of the application has lapsed without default on the part of another former

partner, and a suit is brought by such other partner to restrain the working of the claim by the present holders, the Court will deal with the matter as if upon a re-hearing before the Warden. *McKinnon v. Collie*, N.Z.L.R. 4 S.C., 298. *Williams, J.* (1886). N.Z.

**30.—Partnership or joint tenancy in claim.**—In the absence of an agreement to the contrary, a gold mining claim taken up under the N.Z. *Mining Act* 1886 (50 Vic. No. 51), is partnership property, and not property held by the proprietors as joint tenants. *Gallagher v. Talty*, 7 N.Z.L.R., 35. *Williams, J.* (1888). N.Z.

**31.—Partnership or joint tenancy in claim.**—An agreement to the effect that the object of the venture shall be to extract gold from auriferous earth within the limits of the claim, and after payment of expenses to divide the profits (if any) among the holders, does not constitute them partners with respect to the gold only and joint tenants with respect to the land itself. *Gallagher v. Talty*, 7 N.Z.L.R., 35. *Williams, J.* (1888). N.Z.

**32.—Amalgamation of claims—Pegging out—Agent—Goldfields Act 1866.**—See CLAIM, 27.

**33.—Partnership — Dispute "regarding"—Goldfields Act 1866, sec. 22—Costs—Jurisdiction of Justices.**—See PRACTICE, 119.

**34.—Business License—Mortgage—Goldfields Act 1861—Crown Lands Act 1861—Trustee Act—Vesting order.**—See TRUSTS, 2.

**35.—Sale of interest in mining syndicate—Stamps Act 1886.**—See STAMPS.

## PASTORAL LANDS

See LEASE.

## PASTORAL LEASE

See LEASE.

## PATENT

**1. — Infringement — Gold amalgamator — Injunction.**—In an action for an infringement of

a patent, the invention of a gold amalgamator, with a count in detainee for the machine, a judge had granted *ex parte* an injunction, under the *Common Law Procedure Act*, restraining the defendants from using the machine. On motion to dissolve the injunction—the defendants' case being that they purchased the machine from a third person authorised by the plaintiffs to sell it—the Court dissolved the injunction on the ground that whether it was an infringement of a patent or not, it was not a case for an injunction. *Golding v. Humble*, 4 N.S.W.S.C.R. (L.), 310. *Stephen, C.J., Cheeke and Faucett, JJ.* (1865). N.S.W.

2.—**Infringement—Quartz-crushing machinery.**—A., desiring to erect some quartz-crushing machinery, contracted with M. for its construction, and for the attaching to it of a machine, for which letters of registration had been granted within New South Wales, under 16 Vic. No. 24. The machine having been procured out of New South Wales, was ready to be supplied by M. under his contract. On the application of the grantees of the letters of registration, the Court refused to grant an injunction to restrain A. from accepting it. *Quære*, whether any restriction in a patent affecting, or intended to affect the buyers of a manufactured article, made and sold in violation of the patent, can be supported. *Russell v. Bruyeres*, 4 N.S.W.S.C.R. (E.), 1. *Stephen, C.J.* (1865). N.S.W.

3.—**Infringement—Insufficiency of specification—Novelty.**—Plaintiff brought an action claiming an injunction to restrain and damages for the infringement of his patent of a high-pressure water-jet ventilator for ventilating mine workings by the defendants. The patent represented a simple contrivance previously known and used, and its essential part was described in the specification to consist in "conducting a small quantity of water from a height" to descend in a vertical direction through a pipe of about one inch diameter, fitted at its lower extremity with a small jet cock of about one-eighth inch internal diameter. Through this cock a jet of water was forced in fine spray so as to carry a current of air with it into an air pipe leading to the works requiring ventilation. Plaintiff's ventilator had one hole in the jet, and defendant's three. At the trial, before *Chubb, J.*, the jury found in plaintiff's favour. *Held*, on motion for nonsuit, that the

description in the specification was too large and not clear enough as to *differentia*, and that on this ground, as well as the grounds of want of novelty and previous use, the rule absolute for nonsuit should be granted. *Bennetts v. No. 5 North Phoenix G.M. Co. Ltd.*, 3 Q.L.J., 182. F.C., *Lilley, C.J. and Harding, J.* (1889). Q.

4.—**Cyanide process—Effect of cancellation of patent on prior license—Estoppel—Royalty.**—*African Gold Recovery Co. v. Sheba G.M. Co. Matthews, J.*, 27th July, 1897. Q.B.D.

## PAYMENT INTO COURT

See PRACTICE.

## PEGGING OUT

See CLAIM; LEASE.

## PEGS

See BY-LAWS AND REGULATIONS; CLAIM.

## PENALTY

See FORFEITURE; REGISTRATION.

**Warden's Court—Recovery of penalty—Information or complaint.**—A proceeding instituted in a Warden's Court for the infliction of a penalty should be commenced by information, and not by complaint. *Barrell v. Clayton*, 1 N.Z.J.R. (N.S.) M.L., 46. N.Z.

## PERMIT

See CROWN LANDS; LEASE; ROAD; PRACTICE, 228.

1.—**Mines Act 1890 (No. 1120), secs. 15, 19—Miner's right—Permit by council—Public road.**—It is the miner's right and not the permit of the local council which gives the title to mine under a public road. *Sims v. Demamiel*, 21 V.L.R., 634; 17 A.L.T., 129, 241; 2 A.L.R., 51. F.C., *Holroyd, a'Beckett and Hood, JJ.* (reversing *Madden, C.J.*), (1895-6). V.

2.—Permit to mine under street—Notice by applicant for lease to holder of permit.]—*See* LEASE, 35.

3.—Permit to mine on public road—Trespass—Jurisdiction of Warden.]—*See* PRACTICE, 228.

4.—Permit—To dig and search for gold—48 Vic. No. 18, sec. 45—Trespass.]—*See* CROWN LANDS, 18.

### PER CONFUSIONEM

*See* GOLD.

### PETITION

*See* COMPANY (WINDING UP).

### PETITION OF RIGHT

*See* PRACTICE.

### PLACE

*See* MINER'S RIGHT.

### PLACE OF BUSINESS

Mining Company—Head office or chief place of business—Dividend duty—Date of return—Dividend Duty Act, 54 Vic. No. 10, secs. 7, 8.]—A company whose object was to purchase a gold mine at Gympie, in Queensland, was formed in London. It was governed by a Board of Directors in London, where the registered office was. The management of the business in Queensland was delegated to two persons as attorneys for the directors. All the mining operations were carried on at Gympie, and all profits were earned there, the proceeds being transmitted to London, where the dividends were declared. The company was registered in Queensland under the *British Companies Act* 1886, and had a registered office at Gympie. It carried on no other business. Its capital con-

sisted of 210,000 fully paid up shares, 90,000 being held by persons in Queensland. *Held* (*Chubb, J., diss.*), that the chief place of business was in Queensland, and that the company was liable to pay duty on all dividends declared, and that the duty was payable and the return in connection therewith should be made within seven days of the declaration of the dividend by virtue of sec. 7 of the *Dividend Duty Act*. *Per Chubb, J.*:—The chief place of business was at London, and the return should be made under sec. 8 of the Act. *Reg. v. Gympie Great Eastern G.M. Co. Ltd.*, 4 Q.L.J., 220. F.C., *Lilley, C.J., Harding, Cooper, Chubb and Real, JJ.* (1893). Q.

### PLANS

*See* MAP; TRESPASS.

### PLATFORMS

Regulations of Mines and Mining Machinery Act 1884 (No. 783), secs. 8 (xxix.), 16—"Platforms."—*Quære*, whether "platforms" in sec. 9, sub-sec. xxix., and in sec. 16 of the *Regulation of Mines and Mining Machinery Act* 1883 (No. 783) means platforms attached to the ladder or to the side of the shaft. *Campbell v. Parker's Extended Q.M. Co. Ltd.*, 10 V.L.R. (M.), 1. *Molenvorth, J.* (1884). V.

### PLEADING

*See* PRACTICE.

### POLICE MAGISTRATE

*See* PRACTICE; BY-LAWS AND REGULATIONS.

### POLICE OFFENCES ACT

Police Offences Act (No. 265), sec. 32—Illegal detention—Fence removed without consent of owner of land.]—Where a person entitled to a fence, erected upon land held at the time under a miner's right, but afterwards sold by the Crown, removed it into an adjoining highway,

after the expiration of the time allowed under the conditions of sale by the Crown: *Held*, that he was not entitled to complain of its detention by a person claiming under the Crown grantee. *Ryan v. Nagle*, 7 V.L.R. (L.), 1. Banco (1881).

V.

## POSSESSION

See BY-LAWS AND REGULATIONS; CLAIM; CROWN; CROWN LANDS; FORFEITURE; LEASE; PRACTICE (WARDEN); TRESPASS.

1. — Joint taking up — Pegging out entire ground — Several men's ground.] — Under the Beechworth By-laws (19th November, 1867): *Held*, that several persons taking up ground of dimensions to which they are jointly entitled, may take possession effectually, by pegging and trenching the corners of the entire, and not the separate single men's portion. *Lightbourne v. Stitt*, 1 A.J.R., 71. *Molesworth, J.* (1870). V.

2. — Trespass—Possession without legal warrant.] — Where A. claims that B. is in possession of land under a lease alleged to be void, and pegs out a claim on such land, A. is not entitled to maintain trespass against B., inasmuch as A.'s possession is without legal warrant. *Whitely v. Schlemm*, 8 V.L.R. (M.), 58; 4 A.L.T., 115. *Molesworth, J.* (1882). V.

3.] — The doctrine of *Critchley v. Graham*, 2 W. & W. (L.), 211, applies only where the person in possession has a strong *prima facie* title. *Antony v. Dillon*, 15 V.L.R., 240; 10 A.L.T., 231. *Hodges, J.* (1889). See LEASE, 42. V.

4. — Possessory title of 60 years good as against the Crown — Lost Crown grant — Memorandum on record "cancelled, and a new grant given," does not re-vest the land in the Crown.] — See *In re Rogers and Broughton (Tilley's Grant)*, 6 W.N., 7; 10 N.S.W.L.R. (L.), 179 (n). *Darley, C.J., Owen and Foster, JJ.* (1888); and *In re Broughton, Ibid.*, 178. *Darley, C.J., Windeyer and Foster, JJ.* (1889). N.S.W.

5. — Writ of Intrusion—Plea—No allegation of title in the defendant.] — To a Writ of Intrusion, the defendant pleaded that the land in question had been granted by the Crown to certain persons, but there was no allegation of title in the defendant. *Held*, a good plea. *Reg. v. Cooper*, 7 N.S.W.L.R. (L.), 15; 2 W.N., 59 (*sub nom.*

*Attorney-General v. Cooper*), (1886), followed. *Attorney-General v. Boyle*, 14 N.S.W.L.R. (L.), 424; 10 W.N., 67. *Darley, C.J., and Stephen, J.* (1893). N.S.W.

6. — Possessory title against Crown — Limitation — Intrusion — 21 Jac. I. c. 2 — 9 Geo. III. c. 16.] — *Attorney-General v. Love*, 17 N.S.W.L.R. (L.), 16. *Darley, C.J., Windeyer and Simpson, JJ.* (1896). N.S.W.

7. — Injunction to restrain injury to lateral support—Title—Possession.] — On an application for an injunction in an action for injury to lateral support to restrain the defendant from continuing or repeating acts calculated to affect injuriously the plaintiff's land, the plaintiff may rely on his possession merely, without showing in what way he has acquired a right to mine under the *Goldfields Act* 1866 (30 Vic. No. 32). *Great Extended Sluicing Co. v. Hales, Mac.*, 896. *Chapman, J.* (1871). N.Z.

8. — Possession of claim—Can only be put an end to by forfeiture or abandonment.] — *Per Richmond, J.*, at p. 13:—"In cases in which possession has not been actually and intentionally abandoned the possessory right of the occupier can only be put an end to by a regular adjudication of forfeiture or abandonment. This is the law in Victoria (*see the leading case of Critchley v. Graham*, 2 W. & W. [L.], 211), and also, I think, in this colony." *Woodward v. Earle*, 2 N.Z.J.R., 12 (1874). N.Z.

9. — Claim — Title to — Frontage and block claims—Inconsistent titles—Warden's order for possession—Ballarat Mining By-law III.] — See CLAIM, 11.

10. — Lessee in possession after declaration of forfeiture—When may bring action for trespass.] — See LEASE, 29.

11. — Possession—Of claim—Amalgamation of claims—Pegging out—Goldfields Act 1866.] — See CLAIM, 27.

12. — Possessory title against Crown—Crown grant with reservations—9 Geo. III. c. 16.] — See CROWN LANDS, 23.

13. — Lessor and lessee—Underground workings—Evidence of possession.] — See LEASE, 63.

14. — Land held under miner's right—Sale by bailiff — Transfer — Possession.] — See MINER'S RIGHT, 43a.

## PRACTICE

See ACCOUNT; COMPANY (*passim*); DAMAGES; EVIDENCE.

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## I.—ABSENT DEFENDANT.

See PRACTICE (EXECUTION, FOREIGN JUDGMENT, FOREIGN CORPORATION).

1.—Absent defendant—Reserving rights of, in Court of Mines decree.]—*Seemle*, that the power of a judge of the Court of Mines to make a decree reserving the rights of an absent defendant, should be exercised only on his own doubts as to the justice of the case against him, and not on the objection of the other defendants. *Mitten v. Spargo*, 1 A.J.R., 70. *Moleworth, J.* (1870). V.

2.—Absent Defendants Act—4 Vic. No. 6, secs. 17, 19—Co-partners—Joint contractors.]—In an action under sec. 17 of the *Absent Defendants Act* against several defendants on behalf of a co-partnership, for the purpose of promoting a company to work certain mineral leases, consisting of the defendants and others not known, a verdict for the plaintiff must be on the partnership liability and against all the defendants sued; the defendants cannot be treated as joint contractors under sec. 19, by which a verdict may be taken against one defendant on failure of proof as to the others. *Kemwood v. Hoskins*, 16 N.S.W. L.R. (L.), 45; 11 W.N., 126. *Darley, C.J., Windeyer and Innes, JJ.* (1895). N.S.W.

3.—Absent Defendants Act—4 Vic. No. 6, secs. 17, 18—Members of co-partnership not known—Description in writs and pleadings.]—*See Tan- gyes v. Nelson*, 3 N.S.W. W.N., 100. *Innes, J.* (1887). N.S.W.



4.—Mining company—Suing wrong defendant—Execution—Absent Defendants Act.]—See PRACTICE, 193.

5.—Absent Defendants Act—Foreign corporation.]—See PRACTICE, 166.

## II.—ACTION.

6.—Manager.]—The Act 18 Vic. No. 42, enacted that the manager of a company, registered under it, should be sued as manager in the County Court. A manager of such a company was sued as such in the Supreme Court. *Held*, that he could only be sued as manager in the County Court. *Jackson v. Bennett* (unreported), 22nd June, 1861. V.

7.—Drainage contract—Constantly working—Sunday.]—S. agreed with C. to drain a line of reef, and covenanted that he would constantly, and without stoppage, work and continue working the engine and pumping machinery on the reef, and C. covenanted to pay S. ten shillings per week. The pumps were kept going every day except Sunday. No injury was sustained by the stoppage on Sunday. In an action by S. against C. for the ten shillings per week, the judge of the County Court held that the breach of the covenant to keep the pumps constantly at work was proved, the same being a condition precedent to the plaintiff's right to enforce payment, and directed a nonsuit. *Held*, on appeal, that S. had sufficiently complied with the contract to entitle him to recover, and that the nonsuit was wrong. *Stevens v. Craven*, 2 V.R. (L.), 37; 2 A.J.R., 35. Banco (1871). V.

8.—Uncertificated insolvent—Right to bring action for trespass.]—An uncertificated insolvent who holds a miner's right may maintain a complaint before a Warden for trespass on a residence area, and his assignee is not a necessary party to such a proceeding. *Madden v. Hetherington*, 3 V.R. (L.), 68 (1872), followed. *Fancy v. North Hurdfield United Co.*, 8 V.L.R. (M.), 5; 3 A.L.T., 89. *Stawell, C.J.* (1882). V.

9.—Goldfields Act (25 Vic. No. 4)—Repealed Statute—Right of action on judgment.]—By the *Goldfields Act* (25 Vic. No. 4), any order of any Court of Appeal for payment of damages for encroaching on a claim might be enforced by distress and sale. This Act was repealed on 15th January, 1867. Declaration on order made in

December, 1866, under 25 Vic. No. 4, by a Court of Appeal, for the payment of £89 by defendant to plaintiff, for encroaching on plaintiff's claim, after stating that the defendants were, by the said Court of Appeal, adjudged and ordered to pay the said money to the plaintiff, and that the said order was still unsatisfied, averred that the said cause of action arose within the jurisdiction of the said Court of Appeal. *Held*, on demurrer, that the plaintiff, having by the repeal of 25 Vic. No. 4, been deprived of the remedy prescribed by Statute, had no other remedy except by action, and that the action would lie. *Foster v. Hayes*, 7 N.S.W.S.C.R. (L.), 4. *Stephen, C.J., Hargrave and Cheeke, JJ.* (1867). N.S.W.

10.—Action against three defendants—Verdict.]—In an action by Hargraves and O'Brien against L. Cohen, C. T. Sandon and M. Cowlishaw for breach of agreement to purchase certain coal lands, the following verdict was returned:—"Verdict for defendants, Sandon and the Cowlishaws; no verdict as regards defendant Cohen." The Court, no leave being reserved, refused to grant a rule to enter a nonsuit or to enter a verdict for the defendant *Cohen*, as the jury were unable to determine whether or not he was liable. *Hargraves v. Cohen*, 12 N.S.W.S.C.R. (L.), 310. *Martin, C.J., Hargrave and Cheeke, JJ.* (1873). N.S.W.

11.—Companies Act 1864, sec. 123—Liquidator—Application in Chambers—Cumulative remedy.]—Sec. 123 of the *Companies Act* 1864, empowering a liquidator to apply to a judge of the Supreme Court in Chambers, does not deprive him of his right to bring an action for unpaid calls, but is a cumulative remedy. *Inglewood Mining Venture Ltd. v. Price*, 6 S.A.L.R., 2. *Hanson, C.J., Gwynne and Wearing, JJ.* (1872). S.A.

12.—Action for damages for loss incurred in defending mistaken action—Absence of malice.]—Complainants recovered damages in the Warden's Court for alleged trespass. Subsequent surveys showed that defendants had not trespassed. They appealed, and the Warden's decision was reversed. Defendants then sued for damages for loss of time and the expenses incurred in defending the action for the alleged trespass. *Held*, that as the respondent's proceedings were not shown to be malicious the

action would not lie. *Ahearn v. Hogan*, 1 N.Z.J.R. (N.S.) M.L., 45. N.Z.

13.—Limitation of action for forfeiture of shares.]—See COMPANY, 222.

14.—Action — “Promoter” against “legal” manager—Mining Partnership Act (N.S.W.)]—See COMPANY, 95.

15.—Action—Holders of miner's rights and shareholders against manager, also a shareholder — Dispute “regarding” partnership — Jurisdiction of justices—Costs.]—See PRACTICE, 119.

16. — Unregistered mining partnership — Covenant to pay calls—Action against shareholder.]—See PARTNERSHIP, 19.

17.—Illegal association—Right to sue.]—See COMPANY, 82.

18.—Action—Sale of shares—Calls—Right of action of registered holder against transferee.]—See COMPANY, 234.

19.—Action—Instalments—Company—Plea of fraud—Liquidation.]—See COMPANY, 238.

19a.—Action—Shares — Forfeiture — Damages — No equitable relief claimed.]—See COMPANY (SHARES).

19b.—Action against Warden—Judicial act—Refusal to swear assessors.]—See PRACTICE, 430b.

19c.—Action—Mines Regulation Act 1889 (Q.), (53 Vic.No.7), secs. 18, 26—Person killed in mine — Right to recover compensation—Person entitled to sue — Personal representatives.]—See NEGLIGENCE, 4.

### III.—AMENDMENT.

See BY-LAWS AND REGULATIONS; CLAIM; FORFEITURE; PARTNERSHIP; PRACTICE, XLV., LXIV.

20.—Parties—Striking out plaintiffs.]—An amendment under the *Mining Statute* 1865, sec. 130, in a plaint summons in the Court of Mines, striking out plaintiffs' names, may be made at any stage of the case. *Osborne v. Elliott*, 6 W.W. & A'B. (M.), 49; N.C., 20; A.R., 14th Sept., 1869. *Molesworth, J.* (1869). V.

21.—Warden's summons — Dismissal — Practice.]—Where a complainant in a proceeding

before a Warden, at the hearing, asked that certain amendments should be made in the summons, which were altogether inconsistent with the summons, and the summons as it originally stood could not be supported: *Held*, that the Warden was justified in dismissing the summons without allowing any amendment. *Lindgren v. Halpin*, 3 A.J.R., 107. *Molesworth, J.* (1872). V.

22.—Parties — Adding new plaintiff — Action for forfeiture of shares.]—See COMPANY, 222.

23.—Warden's Court—Appeal to District Court — Amendment of summons.]—See PRACTICE, 442.

### IV.—APPEAL.

See COMPANY; PRACTICE (COSTS, CHIEF JUDGE).

24. — From Warden — Appeal Summons — Amendment.]—Where an appeal summons was taken out under the Act No. 32, sec. 48, calling upon the respondents to show cause why the Warden's decision should not be “reversed,” and at the hearing the judge, at the request of the respondents, added the words “or varied;” the appellants protested, but remained, and went on with the appeal. *Held*, that the judge had jurisdiction to act as he had done. *Re Jenkinson, ex parte Clarke*, 1 W. & W. (L.), 209. *Banco* (1862). V.

25.—Refusing possession.]—There was no appeal under the Act No. 32, secs. 84 and 88, from the decision of a Warden refusing to give possession of ground on a complaint before him to be put in possession. *Power v. M'Dermott*, 2 W. & W. (L.), 241. *Banco* (1863). V.

26.—Complaint—Grounds of decision.]—B. applied to a Warden under the Act No. 32 to be put in possession of surplus land held by K. The Warden declared the surplus forfeited, and ordered possession to be given to B. K. appealed to the Court of Mines. On the hearing of the appeal B. admitted that he could not support the decision for forfeiture, as the complaint was not for forfeiture, but to be put in possession of surplus ground, and proposed to strike out the adjudication of forfeiture and retain the order giving possession only, and to give evidence that K. had pegged out too much land. The judge decided that he could not so amend, and the appeal was allowed. *Held*, that the Judge was wrong; that he ought to

have heard the evidence and decided whether the subject matter of the complaint and that of the Warden's adjudication were substantially the same, and varied or upheld the decree accordingly. *Kirk v. Barr*, 2 W. W. & A'B. (L.), 44. Banco (1865). V.

27.]—Under the Act No. 32, in a complaint between A. and B. in the Warden's Court, C., who had not been summoned, had no right to appear as a party; nor had C. any right to appeal to the Court of Mines against the decision, nor any *locus standi* in the Appellate Court. *Band of Hope v. Critchley*, 2 W.W. & A'B. (L.), 47. Banco (1865). See *infra*, 51. V.

28.—Lease.]—*Held*, by the Court, that there was a right of appeal to the Court of Mines from a decision of a Warden on a complaint by an applicant for a lease under the Act No. 148, against a trespasser, as the procedure of the Act No. 32 was incidentally adopted. *Williams, J. (dis.)*, *held* that a right of appeal to be given at all must be expressly given, and that there was no right of appeal expressly given in this Act. *Barker v. Phillips*, A. R., 30th June, 1865. V.

29.—Possession—Dismissal.]—A party in possession of ground, whether the possession was actual or constructive, had a right of appeal under the Act No. 32, against the decision of a Warden dismissing a complaint brought by him. *Tatham v. McGill*, 2 W.W. & A'B. (L.), 113. Banco (1865). V.

30.—Dismissal.]—H., by complaint before a Warden, sought to be put in possession of a share in a claim, the holder of which he declared to be his partner. The Warden dismissed the complaint. *Held*, that under the Act No. 32, possession by a partner could not be adverse, so as to enable the Court of Mines to direct the possession to be restored. *Haynes v. McLeod*, 6th Dec., 1865 (unreported). V.

31.—Copy of order.]—A Warden's order referred to conditions, also imposed by him. On an appeal to the Court of Mines it was objected that the appeal could not be heard under the Act No. 32, as the minute of the Warden's order produced did not contain the conditions to which it referred. *Held*, that the objection would be best met by allowing the appellants to correct the mistake, and obtain a proper copy of the full decision. *Early v. Barker*, 1 W.W. & A'B. (L.), 32. Banco (1864). V.

32.—Warden refusing to interfere.]—Under the Act No. 32 there was no appeal to the Court of Mines where the Warden declined to interfere. *Wardle v. Evans*, 1 W.W. & A'B. (L.), 188. Banco (1864). V.

33.—Where heard—Notice.]—Although by the *Mining Statute* 1865, sec. 213, the appeal from a Warden to the Court of Mines may be heard at any place within the Mining District, it must in the first instance be to the Court held nearest to the place where the decision of the Warden was pronounced. *Vicary v. Row*, 3 W.W. & A'B. (M.), 1. *Molesworth, J.* (1866). V.

34.—Assessors—Trial.]—When a notice of appeal from the Warden to the Court of Mines under the *Mining Statute* 1865, was headed "For Trial by Assessors," and set out the grounds of appeal, but did not set out any question of fact or issue which the appellants required to be tried by assessors: *Held*, that the notice was insufficient; the notice should specify the particular material question of fact which the party serving it wishes to be tried by assessors. The judge has the like power of settlement of the question of fact on appeal under the provisions of sec. 218, which he would have in his original jurisdiction, under sec. 137. *Brennan v. Watson*, 3 W.W. & A'B. (M.), 55. *Molesworth, J.* (1866). V.

35.—Assessors.]—*Held*, that the *Mining Statute* 1865, gives no appeal from the finding of a Warden and assessors on matters of fact; such a decision can only be appealed from on points of law (secs. 212 and 220 considered). *Reg. v. Brewer*, 4 W.W. & A'B. (L.), 124. But see *Moore v. White*, 4 A.J.R., 17, over-ruling this case. Banco (1867). V.

[NOTE.—Sec. 193 does not appear to have been referred to either in the argument or the judgment.]

36.—Notice.]—(1.) In the notice of appeal to the Court of Mines, the title of the Court of Mines appealed to will be sufficient if the district is plainly indicated by it. (2.) The words "against such decision" need not be repeated twice. (3.) The notice should state the date and place of the Warden's order. (4.) The signatures to the notice need not be the actual signatures of the parties. *Frayne v. Carr*, 5 W.W. & A'B. (M.), 12. *Molesworth, J.* (1868). V.

**37.—Copy of decision.]**—“A judge of the Court of Mines has jurisdiction in his discretion to hear an appeal in the absence of a certified copy of the Warden's decision, but not to make an order varying it without the production of such copy.”—*Per Molesworth, J. Crocker v. Wigg*, 5 W.W. & A'B. (M.), 20 (1868). See Act No. 446, sec. 21. V.

**38.—Notice.]**—A notice of appeal from the Warden to the Court of Mines should set out the date of the decision appealed against. “I think as to stating the time when the appeal should be heard, that if the sittings of the District Court are not fixed and publicly announced, a party should not thereby be deprived of his appeal.”—*Per Molesworth, J. Flinn v. Kulgour*, 5 W.W. & A'B. (M.), 32 (1868). V.

**39.—From Court of Mines—On appeal from Warden.]**—Under the Act No. 32 there was no appeal from the Court of Mines to the Supreme Court in a matter before the Court of Mines on appeal from a Warden. *Schultz v. Dryburgh*, 2 W. & W. (L.), 127. Banco (1863). V.

**40.—Preliminary conditions.]**—“Before a judge of the Court of Mines, under the Act No. 32, sec. 71, can interfere between the parties and state a case for appeal, it must under that section appear on the case that the parties could not agree. The non-appearance of this requisite is fatal to the jurisdiction of the judge below to state, and of the power of this Court to hear, such a case. But if notice of appeal and security for costs have not been given, or other requisites have not been complied with, the non-appearance of such requisites does not justify the Court in acting against the maxim—‘*Omnia presumuntur rite esse acta donec probetur in contrarium.*’ At most their absence affords grounds for an application to the Court to strike the case out of the list if, on affidavit, it can be shown that the requisites are absent in fact.” *Inskip v. Inskip*, 3 W.W. & A'B. (L.), 24. Banco (1866). V.

**41.—Winding-up order.]**—There was no appeal from an order made by a judge of the Court of Mines for winding up a company under the Act No. 228. *Perseverance Q.M. Co. v. Bank of New South Wales*, 4 W.W. & A'B. (M.), 21. *Molesworth, J.* (1867). V.

**42.—Improperly set down.]**—When an appeal

from the judge of a Court of Mines had not been transmitted in proper time, in accordance with sec. 72, Act No. 291, yet was set down in the list for hearing: *Held*, that an objection on this ground should be made by moving to have the case struck out of the list, otherwise the appeal would be heard. *Lewis v. Pearson*, 4 W.W. & A'B. (M.), 23. *Molesworth, J.* (1867). V.

**43.—Statement of case.]**—On appeal from judge of Court of Mines to Chief Judge it is the judge's duty to state the case fully, having reference to the particular points raised before him. The Chief Judge will not travel out of the case to go into evidence which the case omitted to set out. The Chief Judge will re-hear when the facts incidental to the decree do not appear to have been made the subject of evidence, or when he cannot arrive at any conclusion from the evidence as set forth; but when the evidence set out warrants the decree the Chief Judge will not re-hear. *Lewis v. Pearson*, 4 W.W. & A'B. (M.), 25. *Molesworth, J.* (1867). V.

**44.]**—Where a judge of a Court of Mines made an order regarding the extension of time for appealing, and an appeal to the Chief Judge was entered against such order: *Held*, that as the matter was wholly for the discretion of the judge, his order could not be appealed from. *Collins v. Hayes*, 5 W.W. & A'B. (M.), 24. *Molesworth, J.* (1868). V.

**45.—Which judge to state case.]**—The judge of the Court of Mines in which any case is tried is competent to state a special case by way of appeal under sec. 172 of the *Mining Statute 1865*. When a judge dies, or is removed, his successor is the proper person to state the case. *Brennan v. Watson*, 6 W.W. & A'B. (M.), 1. *Molesworth, J.* (1869). See Act No. 446, secs. 9, 10, 11. V.

**46.—Mining Statute 1865, sec. 219—Event of the appeal—Money paid into the hands of Warden—Money had and received.]**—A Warden gave damages against a number of persons (G. and party), defendants in a complaint before him for encroachment. The defendants appealed to the Court of Mines. The Warden, under sec. 219 of the *Mining Statute 1865*, ordered a stay of execution on payment by defendants (of whom M. was one) into his hands, of the amount of the damages and costs, to abide the event of the appeal. M. paid this money, and obtained a receipt for it. The receipt was headed “B. and

others v. G. and others." The appeal was allowed in favour of M., and dismissed with regard to the other appellants. After the appeal was so determined, the Warden paid over the money which he had received from M. to the complainants before him, he being of opinion that, as they had been successful in the appeal against some of the appellants, they were entitled to receive it. M. then sued the Warden for the amount as money had and received. *Held*, that he could not recover, inasmuch as not having severed in his appeal as he might have done, he and the other defendants went together in the appeal; and, as the complainants before the Warden succeeded against some of the defendants, the complainants were entitled to the money. *Morganti v. Bull*, 6 W.W. & A.B. (L.), 134. Banco (1869). V.

47. — Appeal — From Warden — Mining Statute 1865, sec. 212 — Service of notice on parties—On Warden—Waiver—Certificate under sec. 213 — Warden's register.] — *Seem*, that where several complainants appear before the Warden by the same attorney, and one of them is in especial communication with him, as to the conduct of the case, that one would sufficiently represent all the parties, to make service of notice of appeal to the Court of Mines on him sufficient, under sec. 212 of the *Mining Statute* 1865. Whether the parties served sufficiently represent all the parties interested is a question for the discretion of the judge of the Court of Mines. *See Re Rogers, ex parte Shean*, 2 W.W. & A.B. (L.), 84. When service upon the Warden is resorted to, he must be served within the three days limited by sec. 212; and, *seem*, that service at his residence, or on his clerk at his office would be good. Service of a notice to produce a document at the hearing of the appeal, is not a waiver of an objection to the service of notice of appeal. *Whiteman and Ward v. McGallan*, 6 W.W. & A.B. (M.), 23. *Molesworth, J.* (1869). V.

48.]—The *Mining Statute* 1865, sec. 213, provides that no appeal to the Court of Mines shall be heard unless at the hearing of such appeal a copy of the minute of such decision, and of the order thereon, signed and certified under the hand of the Warden, shall be produced to the Court. *Held*, under this section:—(1.) That a certificate of a Warden, which purported to certify to the copy of "the decision," but not

to the copy of "the order thereon," was not in compliance with the requirements of the section' (2.) That the judge might adjourn the hearing of the appeal for the purpose of enabling the appellant to produce a proper certificate. (3.) That the Warden's register containing the decision and order, could not be used so as to dispense with the production of the Warden's certificate. *Ibid.* See Act No. 445, secs. 19, 21. V.

49.—Preliminary objection — Special case—Attorney before Warden — Service.] — Preliminary objections made to an appeal being heard by the Court of Mines, for want of service of notice of appeal or otherwise, may be the subject of a special case to the Chief Judge under the *Mining Statute* 1865, sec. 171. The power of an attorney in the Warden's Court ceases upon the decision, so that he does not represent his client to receive notice of appeal. Respondents, in an appeal to the Court of Mines, have a right to be heard to object to defective service, and to cross-examine witnesses and give evidence upon controverted facts as to service. *Murphy v. Neil*, 6 W.W. & A.B. (M.), 45. N.C., 19. *Molesworth, J.* (1869). See Act No. 446, sec. 19. V.

50.—Notice—Date of sitting of Court of Mines — Mining Statute 1865, sec. 212 — Attorney — Signature of appellant.]—On appeal from a Warden to the Court of Mines it is not sufficient that the notice of appeal is signed by the attorney "for and on behalf of the appellants," but the appellants' names should appear at the bottom of the notice. The notice should state the day of the sitting of the Court of Mines at which the appeal is to be heard if the day is fixed; if not fixed, no particular date for the sitting of the Court of Mines should be inserted, but the words of the *Mining Statute*, sec. 212, as to the next Court of Mines, may be used in the notice. *Ryan v. Callaghan*, 6 W.W. & A.B. (M.), 54; N.C., 23. *Molesworth, J.* (1869). V.

51.—Appeal or re-hearing—Grounds of appeal —Mining Statute 1865, sec. 216.] — An appellant from a decision of a Warden to a Court of Mines is entitled to have the case re-heard, on appeal before the Court of Mines, to the extent of being allowed to prove another and different case to that proved before the Warden. Appeals from the Warden under the *Mining Statute* 1865 should be practically re-hearings. The appel-

lant is confined to the grounds stated in his notice of appeal, subject to the relaxation of sec. 216. *Semble*, that persons who do not appear before the Warden may appeal. *Constable v. Smith*, 6 W. W. & A'B. (M.), 58; N.C., 70. *Molesworth, J.* (1869). V.

52.—From Court of Mines — Estimation of damages.]—*Semble*, that on an appeal from a Court of Mines to the Chief Judge, from a decree of the inferior Court awarding damages for an encroachment, the Chief Judge may increase the damages if he think them too low. Various modes of estimating the value of auriferous earth considered. *United Working Miners' Co. v. Prince of Wales Co.*, N.C., 71. *Molesworth, J.* (1869). V.

53.—Time for deposit and service—Mining Statute 1865, sec. 212—Computation of time.]—The Mining Statute 1865, sec. 212, provides that in case of an appeal to the Court of Mines from a Warden's decision, the appellant shall within three days from the making of such decision, deposit with the clerk ten pounds, and shall also within the same three days serve the notice of appeal. *Semble*, that these three days are to be reckoned as inclusive of Sundays and holidays; and a *mandamus* to compel a judge of a Court of Mines to hear an appeal from a Warden's decision, which was given on Thursday, but from which no notice of appeal was served till the following Monday, was refused. *Reg. v. Macoboy*, 1 V.R. (M.), 26; 1 A.J.R., 37. Banco (1870). See Act No. 446, secs. 18, 28. V.

54.—Appeal from Court of Mines—Insertion of evidence in special case.]—*Semble*, that when a judge of a Court of Mines, in settling a case on appeal from him to the Chief Judge, under the Mining Statute 1865, sec. 172, refuses to insert a piece of evidence in the case, which is alleged to have been given on the hearing, the Chief Judge cannot insert it, although there are affidavits that such evidence was given. *Mitten v. Spargo*, 1 V.R. (M.), 22; 1 A.J.R., 70. *Molesworth, J.* (1870). V.

55.—Appeal from Court of Mines — Mining Statute 1865, sec. 172—Extension of time for transmitting case—Jurisdiction of judge.]—The Mining Statute 1865, sec. 172, provides that after an appeal case is settled, "the appellant shall, within four weeks of the day from the service of such notice (the notice of appeal), or within such

other time as such judge shall from time to time direct, transmit such case" to the Master in Equity, to be set down for argument before the judge. Where the time for transmitting a special case under this section had expired on March 28th, the judge of the Court of Mines enlarged the time till April 21st, and on April 29th, he, with the consent of the attorneys for the parties, enlarged the time till May 11th. *Held*, that the second enlargement having been granted eight days after the previous enlarged time had expired, the judge had no power to enlarge further, and the appeal was gone. "I think the power to direct a further time, from time to time, must be exercised before each time is expired, as I held in *Brennan v. Watson*, 6 W.W. & A'B. (M.), 1. As to the attorney's consent to the extension, I think his client was not bound by it after the cause was by the Mining Statute out of Court."—*Per Molesworth, J.* *Odgers v. Waldron*, 1 V.R. (M.), 26; 1 A.J.R., 71 (1870). V.

56.—Evidence — Minutes of directors.]—The official agent sued a shareholder for contributions. For the defence the minute books of the board of directors of the company were put in, but were not properly proved, and no objection was taken. *Held*, on appeal, that as the objection was not taken at the proper time to the proof of the minute books, it could not be entertained on the hearing of the appeal. *Reeves v. McCafferty*, 1 A.J.R., 153. Banco (1870). V.

57.—Company — Manager — Justices of the Peace Statute 1865, secs. 150, 151—Recognisance under corporate seal.]—A company registered under the Act No. 228, appealing to the Supreme Court under the *Justices of the Peace Statute*, sec. 150, must enter into the recognisance required by sec. 151, under its corporate seal. A recognisance entered into by the manager of such a company on its behalf is not sufficient. *Pride and Stringers Co. v. Conisbee*, 2 A.J.R., 57. Banco (1871). V.

58.—Decree of Court of Mines for payment of money—21 Vic. No. 32—Mining Statute 1865, sec. 2—Proceedings pending.]—On the 17th October, 1861, a decree was made by the Judge of the Court of Mines at Ballarat, under the Act No. 32 in favour of L., a plaintiff in a suit in which C. was defendant. The decree *inter alia* directed the defendant to pay the plaintiff £35, and interest at ten per cent., on 24th June, 1862,

and a similar sum with similar interest on 24th December, 1862. Defendant to transfer a certain share to plaintiff. Plaintiff to re-transfer the share to defendant on payment of the above amount. On failure of defendant to pay, liberty to plaintiff to sell the share. In pursuance of this decree, defendant transferred the share to the plaintiff, but did not pay the money. Plaintiff did not sell the share, as it was worthless. By one of the rules of the Court of Mines made under the Act No. 32, no execution on any decree for the payment of money could be issued without the permission of a judge granted on summons, and in March, 1871, defendant was summoned before the judge of the Court of Mines at Ballarat to show cause why the plaintiff should not have execution against the defendant for £70, with interest at ten per cent. from December, 1861. The judge dismissed the summons on the ground that the decree sought to be enforced was not for the payment of money. From this decision the plaintiff appealed to the Supreme Court under the Act No. 32. The *Mining Statute* (No. 291), which came into operation on 1st January, 1866, by sec. 2, provides that all proceedings depending in the Court of Mines at the time of the passing of the *Mining Statute* 1865, should be carried on irrespective of the latter Statute. *Held*, that the decree was an order for the payment of money, and that the plaintiff was entitled to the principal sum and six years' interest, and that the appeal to the Supreme Court was within the meaning of the *Mining Statute* 1865, sec. 2. "The language of sec. 2 should, we think, be taken in its fair sense, and should not be cut down in any way."—*Per Stawell, C.J. Lee v. Conway*, 2 A.J.R., 58. Banco (1871). V.

**59.—Mining Statute 1865, sec. 124—Review of discretion of judge—Court of Mines—Parties—Service.**—When on the hearing of a suit before him, a judge of a Court of Mines exercises his discretion under sec. 124 of the *Mining Statute* 1865, as to whether all the defendants are sufficiently represented, the Chief Judge can, on appeal from the Court of Mines, review the discretion exercised by the Court below. *Thompson v. Begg*, 2 A.J.R., 3. *Molesworth, J.* (1871). V.

**60.—Commitment—Mining Statute 1865, secs. 149, 155, 221.**—There is no appeal from orders of commitment under the *Mining Statute* 1865,

as another remedy is provided by the Statute. *See* sec. 221. *Vallancourt v. O'Rorke*, 2 A.J.R., 84. *Molesworth, J.* (1871). V.

**61.—Appeal to Chief Judge—Signing decree after appeal—Decree of one judge signed by another—Date of decree.**—A deputy judge of a Court of Mines made a decree against O'R. by which O'R. was ordered to pay £10 damages and costs and to remove from certain land trespassed upon by him. O'R. appealed to the Chief Judge, who confirmed the decree, but reduced the damages to one shilling. The decree so varied was drawn up as of the date on which it was originally pronounced, and signed by the judge of the Court of Mines, the deputy judge having ceased to act. On being summoned for disobedience of this decree O'R. contended that the decree was a nullity, having been signed by a judge who had not tried the cause nor pronounced the decree, and the summons was dismissed. On appeal, it was held that the dismissal was right. "The decree must be signed by the person who was judge at its date. The Act treats the case as removed to this Court so soon as the appeal is lodged; and I question if even the deputy judge could, after the appeal, have signed the decree; it must be dealt with by this Court alone."—*Per Molesworth, J. Vallancourt v. O'Rorke*, 2 A.J.R., 84 (1871). *See* Act No. 446, secs. 9, 11. V.

**62.—Motion to strike out name of party after judgment—Jurisdiction—Act No. 291, secs. 171, 213—Special case.**—C.'s name was used in an appeal notice from a Warden's decision to a Court of Mines without his authority or knowledge. The appeal was heard, and dismissed with costs. C. was first made aware of this proceeding by the bailiff of the Court levying on his goods for the costs. C. then obtained a summons from the judge who heard the appeal calling on the respondents to show cause why C.'s name should not be struck out of the proceedings of the appeal, and why the execution should not be set aside as against him. Cause was shown, and the judge entertaining some doubt as to his jurisdiction stated a case for the opinion of the Chief Judge. *Held*—(1.) That the difficulty was not a proper one for a special case, as it did not arise on the hearing of any suit or appeal, according to Act No. 291, sec. 171, but as there was no protest against it by either party the Chief Judge would answer the



question, not meaning, however, that the judge below should be bound by the answer. (2.) That in such circumstances the judge of the Court of Mines had jurisdiction to make an order that an appellant's name be struck out from all proceedings in his Court, and that all proceedings should be set aside as against him. (3.) That sec. 213 of Act No. 291, making decisions of Courts of Mines final and conclusive on the parties, means that there shall be no ulterior appeal and no reconsideration of points decided; but that the judge in this case had not considered or decided whether or not C. was really a party to the appeal. *McLeod v. Whitfield*, 2 A.J.R., 104. *Molesworth, J.* (1871). V.

63.—Act No. 291, sec. 212—Notice—Signature of appellant by attorney's clerk.]—A notice of appeal under Act No. 291, sec. 212, was signed thus:—"H. C., by his attorney, J. R. H." On case for the opinion of the Chief Judge as to the sufficiency of this signature, the whole of it having been written by R., H.'s clerk: *Held*, that if C. had authorised the appeal when R. signed the notice, the notice was sufficiently signed. *Cock v. Sayers*, 3 A.J.R., 63. *Molesworth, J.* (1872). V.

64.—Act No. 291, secs. 170, 172—Order for new trial.]—There is no appeal to the Chief Judge from an order of a judge of a Court of Mines directing a new trial, as such an order does not conclude the merits. *Watson v. Morwood*, 3 A.J.R., 21. *Molesworth, J.* (1872). V.

65.—Notice—Affidavits—Appeal a re-hearing—Right to begin.]—Where a Warden made an order on the 25th March, and notice of appeal was given on the 28th of the same month: *Held*, that the notice was in time. Affidavits to be used on the hearing of an appeal from a Warden must be intitled as to parties, as "Appellant v. Respondent," and an affidavit in such an appeal intitled "J. W., plaintiff, v. T. M., defendant," was held to be bad. An appeal from a Warden to a Court of Mines is practically a re-hearing, and the complainant below should begin; but, *semble*, that the judges of Courts of Mines have an absolute discretion as to the order of hearing. *Mole v. Williams*, 3 A.J.R., 21. *Molesworth, J.* (1872). V.

66.—From Court of Mines—Act No. 291, sec. 172—Transmitting case—Time.]—Sec. 172 of

the *Mining Statute* imposes on an appellant from the Court of Mines the duty of forwarding the case within four weeks from the day of serving the notice of appeal, or such other time as the judge shall from time to time direct. Any order extending the time must be made within the four weeks. *Central Q.M. Co. v. Morgan*, 4 A.J.R., 174. *Molesworth, J.* (1873). V.

67.—Notice—Signature.]—A notice of appeal to Court of Mines. (Signed) "T. M., attorney for W. D." D. being the appellant, and assuming that M. was authorised to appeal: *Held* sufficient. *Dillon v. Matthews*, 3 V.L.R. (M.), 5. *Molesworth, J.* (1877). V.

68.—Act No. 446, sec. 19—Act No. 291, sec. 212—Service—Attorney.]—Service of notice of appeal on an attorney under Act No. 446, sec. 19, should be personal or upon a person in his service at his office. Service of the notice of appeal upon the attorney by leaving it with an inmate at his private house *held* not sufficient. *Lawlor v. Grant*, 3 V.L.R. (M.), 12. *Molesworth, J.* (1877). V.

69.—Act No. 446, sec. 20—Complaint before Warden—Evidence Act, sec. 25.]—On appeal from Warden to Court of Mines, the copy complaint required by Act No. 446, sec. 20, need not be certified as a true copy. The complaint in the Warden's Court is not a matter of record so as to enable certified copies to be presented under the *Evidence Act*, sec. 25. The Act No. 446, sec. 20, only requires the appellant to lodge what he represents, verbally or otherwise, as a copy of his complaint. If its correctness is disputed the judge may receive such evidence as he thinks fit, and punish the appellant who has lodged a false copy in costs or perhaps dismiss his appeal. *Hok John v. Yung Hing*, 4 A.J.R., 173. *Molesworth, J.* (1873). V.

70.—Leave to appeal—Terms.]—On obtaining leave to appeal from the decision of the Chief Judge to the Privy Council, it was made one of the terms on which leave to appeal was granted, that the defendant should not mine on the land in dispute pending the appeal. *Australasian G.M. Co. v. Wilson*, 4 A.J.R., 91. *Molesworth, J.* (1873). V.

71.—Warden—Mining Statute 1865 (No. 291), secs. 177, 198, 212.]—An appeal lies from an order of a Warden for a sum under £100 where



the claim accrues to the complainant from a mining partnership, adventure, or interest. *Pride of the East G. M. Co. v. Wimmer*, 4 V.L.R. (M.), 3. *Molesworth, J.* (1878). V.

**72.—Appeal to Privy Council—Statement of appealable amount—Interlocutory order.]—**A motion, by a defendant, for leave to appeal to the Privy Council, was supported by an affidavit in general terms; that the order sought to be appealed from was in respect of a matter in issue above the value of £500. The order affirmed a decree which directed an account; and the amount payable by the defendant, depended upon the result of the account. There was no affidavit on behalf of the plaintiff that the amount in issue was under £500. *Held*, that if the decree had been final, leave to appeal would have been granted; but, that being only interlocutory, the defendant would be entitled to raise the whole question of its liability, upon an appeal from the decree on further directions; and motion dismissed, but without costs. *United Hand-in-Hand and Band of Hope Co. v. National Bank*, 6 V.L.R. (E.), 198; 2 A.L.T., 72. *Molesworth, J.* (1880). V.

**73.—Notice of appeal—Form of heading—Amendment—Mining Statute 1865 (No. 291), secs. 12, 133.]—**A notice of appeal from a Warden's decision was headed "In the Court of Mines for the district of Heathcote," there being no such district. *Held*, that the notice of appeal was bad, and that there was no power of amending it. *Burch v. Brown*, 7 V.L.R. (M.), 10; 2 A.L.T., 149. *Molesworth, J.* (1881). V.

**74.—Mining Statute 1865 (No. 291), sec. 212—Time for appeal—Enlargement by consent.]—**The time limited by the *Mining Statute 1865* (No. 291), sec. 212, for notice of appeal and deposit, may be enlarged by the verbal consent of the parties. *Park Gate Iron Co. v. Coates*, L.R. 5 C.P., 634, followed. *Conway v. Louchard*, 10 V.L.R. (M.), 6; 6 A.L.T., 120. *Molesworth, J.* (1884). V.

**75.—Certiorari—Appeal—Taxation of costs—Settling decree—Mining Statute 1865 (No. 291), secs. 101, 145, 230, 244.]—**The judge of a Court of Mines ordered that costs should be given to the plaintiffs in a mining partnership suit under sec. 101 of the *Mining Statute 1865* (No. 291), but did not tax the costs at the hearing as required by sec. 230. The decree, as afterwards

drawn up by the clerk of the Court, and settled by the judge, fixed the costs to be paid to the plaintiffs by the defendant at £4 19s. The defendant did not attend on the drawing up of the decree, though given notice to do so. On an application by him for a rule to quash the decree and subsequent proceedings in the suit, which had been brought up on *certiorari*: *Held*, that he might have appealed from the decree as settled, as containing more than the decree actually pronounced, but that as the judge had jurisdiction to settle the decree, it could not be quashed upon *certiorari*. *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.), 102; 6 A.L.T., 8. *Higinbotham and Holroyd, JJ.* (1884). V.

**76.—Time for appealing from decree.]—Quære, per Holroyd, J.:—**Whether the time for appealing from a decree of a judge of a Court of Mines runs from the pronouncing or the drawing-up of the decree? *Reg. v. Quinlan, ex parte Sampson*, 10 V.L.R. (L.), 102; 6 A.L.T., 8. *Higinbotham and Holroyd, JJ.* (1884). V.

**77.—Mining Statute 1865 (No. 291), sec. 212, Schedule 29—Notice of appeal from Warden to Court of Mines—Form of notice.]—**Literal compliance with the form given in Schedule 29 is not requisite. Failure to fill up the blank left in the form for the insertion of the name of the place at which the proceedings had been heard by the Warden does not make the notice of appeal bad. *Rees v. Carroll*, 11 A.L.T., 195. *Hood, J.* (1890). V.

**78.—Mines Act 1890 (No. 1120), sec. 210—Appeal from Court of Mines—Companies Act 1890 (No. 1074), Part II., secs. 250-255—Winding up of company.]—**An appeal lies to the Full Court under sec. 210 of the *Mines Act 1890* (No. 1120), from an order of a Court of Mines directing a company to be wound up. *In re Midas Extended G. M. Co., ex parte Morley*, 17 V.L.R., 647. F.C., *a'Beckett and Hodges, JJ.* (*Higinbotham, C.J., diss.*), (1891). V.

**79.—Mines Act 1890 (No. 1120), sec. 315—Appeal from Warden—Compensation.]—**No appeal lies to a Court of Mines from the decision of a Warden fixing the amount of compensation in cases coming within the provisions of sec. 315 of the *Mines Act 1890* (No. 1120). *Wheeldon v. Parkin*, 20 V.L.R., 60; 15 A.L.T., 207. *Hood, J.* (1894). V.

**80.—Goldfields Act (25 Vic. No. 4), sec. 30—**

**Court of appeal—Chairman's qualification.]—**By the *Goldfields Act* (25 Vic. No. 4), sec. 30, "a Court of appeal shall be established and shall consist of a chairman and two other persons who have held miners' rights for six months." *Held*, that the chairman must have so held a miner's right. *Ex parte Harrison*, 1 N.S.W.S.C.R. (L.), 256. *Stephen, C.J. and Wise, J.* (1862).

N.S.W.

**81.—Appeal—Goldfields Act (25 Vic. No. 4)—Chairman's qualification.]—**An appeal was made from the decision of a gold commissioner to the Court of Appeal, not legally constituted by reason of the chairman not holding a miner's right for six months as required by sec. 30 of the *Goldfields Act* (25 Vic. No. 4). The appeal was dismissed. The Supreme Court granted a prohibition against all proceedings by the Court of Appeal in reference to the decision appealed from. *Ex parte Bornulph*, 1 N.S.W.S.C.R. (L.), 326. *Stephen, C.J. and Wise, J.* (1862).

N.S.W.

**82.—Privy Council appeal—Offer by plaintiff to reduce his claim.]—***See Delamont v. Australian Kerosene Shale and Oil Co.*, 1 N.S.W. W.N., 29. *Martin, C.J., Windeyer and Innes, JJ.* (1884).

N.S.W.

**83.—Appeal to Privy Council from Full Court—Transcript.]—**In an appeal from the Full Court to the Privy Council the judgment delivered by the primary judge setting forth his reasons for the decision arrived at by him ought not to be included in the transcript on the ground that the judgment did not fall within Rule 8 of the Order-in-Council of the 13th of November, 1850. (*See Pilcher's Practice*, 301). *Brown v. Patterson*, 4 N.S.W.L.R. (E.), 1; and *Bucknell v. Vickery*, 5 N.S.W.L.R. (E.), 81, followed. *Stockton Coal Co. v. Fletcher*, 5 N.S.W.W.N., 29. *Darley, C.J., Windeyer and Innes, JJ.* (1888).

N.S.W.

**84.—Appeal to Supreme Court from the Mining Appeal Court—Value of property—37 Vic. No. 13, sec. 115.]—**On an appeal to the Supreme Court from the Mining Appeal Court it must appear in the special case that the property in dispute is of an appreciable value. *Scully v. Murn*, 14 N.S.W.L.R. (L.), 289; 10 W.N., 7. *Darley, C.J., Innes and Foster, JJ.* (1893). [*See, however, on this point Bourke v. Lucas*, 3 N.S.W.L.R. (L.), 217 (1882).]

N.S.W.

**85.—Appeal to Privy Council—Orders in Council—Appealable amount—Amount indirectly involved.]—***In re The Bonang G.M. Co. Ltd.*, 4 N.S.W.B.C., 47, distinguished. *Gundagai v. Norton*, 15 N.S.W.L.R. (L.), 459, at p. 463; 11 W.N., 91. *Windeyer, Innes and Stephen, JJ.* (1894).

N.S.W.

**86.—Mining company—Appeal from local Court—Magistrate's ruling.]—**On appeal from a local Court, whether of full or limited jurisdiction, the ruling of the special magistrate need not be obtained in writing where the superior Court can collect from the magistrate's notes the grounds of the decision on the points of law raised at the trial. *Winn's G.M. Co. (Northern Territory) Ltd. v. Wyld*, 8 S.A.L.R., 66. *Hansen, C.J., and Wearing, J.* (1874). S.A.

**86a.—Appeal—Special case.]—**On an appeal from an inferior Court to the Supreme Court, the special case should state the questions to be decided. *Byers v. Kolls*, 1 Q.L.R. Part II., 36. *Cockle, C.J., Lutwyche and Lilley, JJ.* (1877).

Q.

**86b.—Goldfields Act 1874 (38 Vic. No. 11), secs. 71, 73.]—***Semble*, proof of sec. 73 of the *Goldfields Act* 1874, having been complied with is not *prima facie* proof that sec. 71 has also been complied with. *Ibid.*

Q.

**87.—Goldfields Act 1874 (38 Vic. No. 11), secs. 47, 71, 73.—Appeal from Warden.]—**A dispute having arisen between two parties as to a certain claim, the Warden summoned them before him in order that he might settle the matter of complaint. The parties accordingly went before him and were heard, and submitted to his decision. One of the parties afterwards appealed to the District Court under sec. 71 of the *Goldfields Act* 1874 (Q.), (38 Vic. No. 11), but the judge refused to hear the appeal on the ground that sec. 73 of the Act had not been complied with, that section being as follows:—"No such appeal shall be heard unless at the hearing of such appeal a copy of the plaint and notice of defence and of the minute of such decision and of the order thereon signed and certified under the hand of the Warden or his clerk, shall be produced to such Court, and the Warden is hereby required to lodge or cause to be lodged such copy." It appeared that the judge had before him a copy of the entry of the grounds of complaint, of the defence or cross-relief, and of

the decision of the Warden under sec. 47. *Held*, that sec. 73 was sufficiently complied with, and that the judge was bound to hear the appeal. *Bearup v. Barker*, 3 Q.L.J., 45. F.C., *Lilley, C.J., Harding and Mein, JJ.* (1887). Q.

87a.—Goldfields Act 1874 (38 Vic. No. 11), sec. 74, Regulation 25—Mining appeal from District Court judge and assessors—Appeal on question of costs—Judge's discretion—Order for costs part of judgment—Gold Mines Drainage Act 1891, sec. 10—Contribution for expenses of pumping.]—An appeal does not lie from a decision of a District Court judge as to the costs of an appeal from a Warden's Court. *Aliter*, if the judge did not, in fact, exercise any discretion as to the costs. An erroneous application of a real or supposed rule of law adopted by a judge as a guide in the exercise of his discretion as to costs, is not ground for appeal. In deciding between parties to an action, a tribunal is not bound by a statement of facts agreed upon by one party and other persons not parties to the action. *No. 1 North Phoenix G.M. Co. Ltd. v. Phoenix G.M. Co. Ltd.*, 6 Q.L.J., 307. *Griffith, C.J., Cooper and Real, JJ.* (1896). Q.

87b.—District Court—Appeal from Warden's Court—Security for costs—Goldfields Act 1874 (38 Vic. No. 11), sec. 74—District Courts Act 1891, secs. 144, 151.]—Sec. 144 of the *District Courts Act* 1891, does not apply to an appeal by special case under sec. 74 of the *Goldfields Act* 1874, from a decision of a District Court judge. Sec. 151 of the *District Courts Act* 1891, applies to every duty imposed by any Act giving a District Court judge judicial jurisdiction. *Drury v. Brown*, 7 Q.L.J., 14. *Griffith, C.J., Cooper and Real, JJ.* (1896). Q.

88.—Admission in case on appeal—Effect of.]—A case on appeal contained a statement that certain companies, respondents in the appeal, "adopted" rules which might be referred to, but which were in all material respects similar to those set forth in the schedule to the *Mining Companies Act* 1886 (50 Vic. No. 19). *Held*, that it was not open for the respondents, on the case coming before the Court of Appeal, to go behind this, and claim to show that technical objections existed as to the manner in which the rules in each case were adopted, and that they were not duly "made" under sec. 12 of the Act. *Bank of New Zealand v. Rose*, 10 N.Z.L.R., 484.

*C.A., Prendergast, C.J., Denniston and Connolly, JJ.* (1891). N.Z.

89.—Mining Act 1891 (N.Z.), (54 & 55 Vic. No. 33), sec. 286—Appeal from Warden—Enlargement.]—The second clause of sec. 286 of the *Mining Act* 1891 (54 & 55 Vic. No. 33), enlarges the right of appeal given by the first clause of that section. *Bald Hill Sluicing Co. v. Magnus*, 13 N.Z.L.R., 354. *Williams, J.* (1895). N.Z.

89a.—Mining Act 1891 (54 & 55 Vic. No. 33), sec. 287—Notice of appeal—Time and place of appeal—Appeal on matter of law only.]—A notice of appeal from the decision of the Warden of the gold mining district of Hauraki was headed, "In the Supreme Court of New Zealand, Northern District," but did not state that the Appellate Court would sit at Auckland, nor was any time mentioned when the appeal would be heard. The last time that special days were appointed by the Court for hearing these appeals was in the year 1889, under the *Mining Act* 1886, but no special days had been fixed under the *Mining Act* 1891. The principal ground of appeal was that, from the facts as found by the Warden, a judgment of forfeiture should have been pronounced. *Held*—(1.) That "the Supreme Court of the Northern District" was a sufficient description of the place of hearing. (2.) That no special days were fixed for the sitting of the Court at the time the notice of appeal was given. (3.) That the case was one involving questions of law only. *Cooper v. Komata G.M. Co.*, 14 N.Z.L.R., 66. *Conolly, J.* (1895). N.Z.

90.—Discretion of Warden—Appeal.]—See PRACTICE, 411.

91.—Mining Act (37 Vic. No. 13), secs. 78, 106—Schedule XI.—Appeal from Warden—Jurisdiction of District Court—Minute of decision.]—See PRACTICE, 152a.

92.—Rule nisi for prohibition—Effect of appeal pending in District Court.]—See PRACTICE, 330a.

93.—Appeal—To N.S.W. District Court from Warden—Special case from Warden—Jurisdiction of Supreme Court.]—See PRACTICE, 423.

93a.—Appeal from Warden—Security for costs—Statement of special case by District Court judge (Q.)—See PRACTICE, 152b.

94.—Appeal from Warden's Court—District Court—When constituted.]—See PRACTICE, 443.

95.—Application for claim (N.Z.)—Refusal by Warden—Appeal.]—See PRACTICE, 440.

96.—Warden's Court—Appeal to N.Z. District Court—Amendment of summons.]—See PRACTICE, 442.

97.—Warden's Court—Appeal to N.Z. District Court—Notice of appeal—Time for appealing.]—See PRACTICE, 447.

98.—Warden's Court—Appeal to Supreme Court—Re-hearing—Costs—N.Z. Mining Act 1886 (50 Vic. No. 51), secs. 250, 256.]—See PRACTICE, 126.

#### V.—CERTIORARI

See COMPANY (WINDING UP); PRACTICE (COSTS, SERVICE, SUPREME COURT, WARDEN).

99.—The Act No. 153.]—*Certiorari* is taken away by the *Drainage Assessment Act* (No. 153). *Reg. v. Mollison*, A.R., 7th July, 1868. See Act No. 291, sec. 244. V.

100.—Courts of Mines—Act No. 291, sec. 244—Want of jurisdiction—Fraud.]—Courts of Mines stand in relation to the Supreme Court on the footing of inferior Courts, and the power of the Supreme Court to issue a *certiorari* to these Courts in respect of any proceeding under the *Mining Statute* 1865 has been taken away by statute; but the effect of this privative clause is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. See *Reg. v. St. Olave*, 8 E. & B., 529. Such a writ would lawfully issue on the ground of want of jurisdiction in the judge who made the order, or of fraud in the party procuring it. Such an order cannot be impeached on the ground that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try; and when the objection is one of fraud the fraud must be clear and manifest. *Colonial Bank v. Willan*, L.R. 5 P.C., 417; 43 L.J.P.C., 39; 30 L.T., 237; 22 W.R., 516; 5 A.J.R., 53. J.C., *Sir J. W. Colvile*, *Sir B. Peacock*, *Sir M. E. Smith*, *Sir R. P. Collier* and *Sir L. Peel* (1874). V.

101.—*Certiorari*—Mining Statute 1865 (No. 291), secs. 101, 145, 230, 244—Taxation of costs—Settling decree—Appeal.]—See PRACTICE, 75.

#### VI.—CHARGING ORDER.

See COMPANY.

#### VII.—CHIEF JUDGE.

See PRACTICE (APPEAL, COURT OF MINES).

102.—Decree—Duty of district judge—Appeal—Costs—Act No. 291, sec. 74—Assignment after decree.]—Under the Act No. 291, sec. 174, the decision of the Chief Judge, on appeal from the Court of Mines, should be entered in the register, and be deemed a decree or order of the latter Court, and should be proceeded on accordingly, and the judge of the Court of Mines should exercise no discretion as to its propriety, but regard his duties as ministerial. His refusal to carry out the order is not the subject of an appeal to the Chief Judge, but if he dismiss a summons, asking to have the decree executed with costs, the order for costs may be regarded as a subject of appeal. On such a summons the judge of the Court of Mines should not take cognisance of facts, showing that the plaintiff was a trustee for others at the time of obtaining the decree, and that his *cestui que trust* had since assigned to the defendant. *Attorney-General v. Boyd*, 4 A.J.R., 103, distinguished. *Brain v. M'Coll*, 5 A.J.R., 17. *Molesworth, J.* (1874). V.

#### VIII.—CO-COMPLAINANT.

See MINER'S RIGHT.

#### IX.—COMMITMENT.

See PRACTICE (APPEAL, CONTEMPT, WARDEN).

#### X.—CONTEMPT.

See PRACTICE (INJUNCTION, WARDEN).

103.—Contempt of Court—Gold Commissioner—Disobedience of order of.]—See PRACTICE, 284.

104.—Contempt—Injunction—Notice of—Breach.]—See PRACTICE, 195.

#### XI.—COSTS.

105.]—Where on appeal under the Act No. 32, to the Supreme Court, from the Court of Mines, it appeared that the judge had been mistaken on the points principally contested, the Court dismissed the appeal without costs, as it had to be disposed of on a by-point appearing on the case.

*Banks v. Granville*, 1 W. & W. (L.), 164. Banco (1862). V.

106.]—Costs were not given on special cases to the Supreme Court, stated under the Act No. 32, sec. 70. *Jenkinson v. Cumming*, 1 W. & W. (L.), 337. Banco (1862). V.

107.—Dismissal of complaint for want of prosecution — Striking out case — Certiorari.]—A Warden refused to adjourn the hearing of a complaint before him, the complainants not being prepared to proceed; and dismissed the summons with costs. It was contended for the complainants that the Warden had no power to dismiss the case, but could only strike it out, and could not give costs. *Held*, that the order made by the Warden practically amounted to a dismissing of the suit for want of prosecution. But no provision for such a case had been made by the Act. So far as the plaintiffs were concerned, if the order was allowed to stand, they could not proceed further in the case, and they would have great difficulty in instituting any other suit. The rule *nisi* for a writ of *certiorari* was therefore made absolute on that ground. No costs allowed either of the rule or of any previous proceedings. *Reg. v. Carr*, 6 W.W. & A.B. (L.), 240; N.C., 59. Banco (1869). V.

108.—Act No. 291, sec. 230—Act No. 324, sec. 3—Jurisdiction.]—A judge of a Court of Mines cannot give costs on refusing an application under the Act No. 324, sec. 3, to set aside a winding-up order. "One Court exercises the two jurisdictions—that given by the *Mining Statute*, and that by the *Limited Liability Act*—each jurisdiction is separate and distinct from the other, and the power to give costs under the *Mining Statute* does not justify the giving of costs when exercising a jurisdiction conferred by another and a different Act." *Stawell, C.J. Reg. v. Bowman*, 3 A.J.R., 109 (1872). *Quere—Reg. v. Willan, supra* (PRACTICE, 228, 230—Taxation—Scale.)—On a complaint, the Warden, he fixed the amount without reference to any prohibition to restrain the order, it was held that the amount so fixed was not the amount which could have

been allowed having reference to the scale; and *held*, further, that if the Warden were wrong, and no appeal lay from such order, *certiorari* would be the proper remedy. *Ex parte Lawlor, re Strutt*, 3 V.L.R. (L.), 1. Banco (1877). V.

110.—Costs—Attorney's bills—Common Law Procedure Statute 1865, secs. 388, 396—Separate suit.]—The proviso of sec. 396 of the *Common Law Procedure Statute* 1865 (No. 274) is an absolute bar to taxation after the expiration of twelve months from payment, but if paid within twelve months preceding the application special circumstances may induce the Court to have the bill taxed. *Quere*, whether an attorney whose costs have been duly paid is justified in leaving his client during the progress of a suit. *Semble*, he is not, unless there is a "break" in the litigation. *In re Hardy and Madden, ex parte United Hand and Band Co.*, 7 V.L.R. (L.), 266; 3 A.L.T., 10. *Stawell, C.J., and Higinbotham, J.* (1881). V.

111.—Costs—Attorney and client—Taxation.]—Where, upon an order for taxation as between attorney and client, more than one-third of the bill of costs was taxed off, the Court, upon that ground alone, gave to the client the costs of the summons and order for taxation. *In re Hardy and Madden, ex parte United Hand and Band Co. Regd.*, 7 V.L.R. (L.), 450; 3 A.L.T., 75. *Stawell, C.J., Williams and Holroyd, JJ.* (1881). V.

112.—Costs—Attorney and client—Bill of costs—Taxation—Break in suit.]—Where, upon a demurrer to a bill in Equity being over-ruled, there was a large amendment of the pleadings, and thus a pause in the litigation, but the solicitors continued to advise with their clients, the plaintiffs, as to what course should be pursued: *Held*, that the solicitors could not treat such pause as a break in the suit, with reference to the right of the client to have a taxation of their costs. *Re Hardy and Madden, ex parte United Hand and Band Co. No Liability*, 7 V.L.R. (L.), 476; 3 A.L.T., 76. *Stawell, C.J., Higinbotham and Holroyd, JJ.* (1881). V.

113.—Complication of title—Costs.]—Where a company had complicated its rights, and its title to ground was unsuccessfully impeached: *Held*, not entitled to costs. *Fattorini v. Rand and Albion Consols*, 9 V.L.R. (M.), 1; 4 A.L.T., 121. *Molesworth, J.* (1883). V.

**114.—Taxation of costs—Party and party—Allowance for scientific witnesses qualifying themselves.**—Where, in order to qualify themselves to give evidence, surveyors were employed to survey and inspect a mine, and to inspect and enlarge a map in the Mining Department upon which the case turned: *Held*, that reasonable allowances should be made therefor in taxation between party and party. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 71; 5 A.L.T., 12. *Mollesworth, J.* (1883). V.

**115.—Security for costs.**—An order that the plaintiff should give security for costs is discretionary, and poverty or even insolvency is not a sufficient ground. But where the plaintiff was a no-liability mining company which had virtually ceased to exist: *Held*, that the order should be made. *Lal Lal Iron Co. v. Mulligan*, 11 V.L.R., 58; 6 A.L.T., 177. *Higinbotham, J.* (1885). V.

**116.—Company—Security for costs—Poverty.**—A no-liability company is in the same position as an individual, and will not be ordered to give security for costs of an action on the ground of poverty. *Mount Delegate Co. v. Teague*, 16 V.L.R., 772; 12 A.L.T., 121. *a'Beckett, J.* (1890). V.

**117.—Security for costs—No-liability company—Action by liquidator.**—A liquidator of a no-liability company, who is suing for the purpose of getting in the assets of the company, will not be ordered to give security for costs of the action. *Mackie v. Clough*, 17 V.L.R., 201; 12 A.L.T., 184. *Hood, J.* (1891). V.

**118.—Special case—Costs.**—Costs should be given to the successful party on a special case stated by a Warden. *Allison v. Sharp*, 17 A.L.T., 240; 2 A.L.R., 50. *a'Beckett, J.* (1896). *Fancy v. North Hursfield United Co.*, 8 V.L.R. (M.), 5; 3 A.L.T., 89. *Stavell, C.J.* (1882). V.

**119.—Costs — Goldfields Act 1866 — Dispute “regarding” partnership.**—Upon complaint made, under sec. 22 of the *Goldfields Act 1866*, by certain persons holding miners' rights, and shareholders in a company against the manager, or agent of the company, also a shareholder in that company, that a certain sum was due to them for work done for the company on a contract with the manager, the justices ordered the sum claimed

to be paid, and also awarded professional costs and costs of Court. *Held*, that the justices were wrong in awarding costs. The question of jurisdiction not decided; *Stephen, C.J.*, and *Checke, J.*, being under the impression that the justices had no such jurisdiction, as the dispute did not “regard” the partnership in the sense used in the Act; *Hargrave, J.*, being inclined to hold that the justices had such jurisdiction. *Ex parte Mulholland*, 11 N.S.W.S.C.R. (L.), 310. *Stephen, C.J.*, *Hargrave and Checke, JJ.* (1872).

N.S.W.

**120.—Costs — Taxation — Cross action.**—B. sued D. to recover £4,324 Os. 6d. for coals sold and delivered. D.'s only plea was one by way of cross action, that he was entitled to a larger sum than B.'s claim for breach by B. of a contract to deliver D. a quantity of coal at a certain price below the market value. At the trial D. began, B.'s claim being expressly admitted. The jury found a verdict for B. with £2,034 6s. as damages, and the *postea* was so entered. There was also a statement on the back of the issue that the jury found for D. on the plea of cross action, with damages £2,290. On a motion to review the Prothonotary's taxation of B.'s costs: *Held*, that B. should, on taxation, be allowed the general costs of the action. *Held*, also (*Hargrave, J., diss.*), that B. should be allowed the costs of proving his claim. *Held*, also, that B. should be allowed any witnesses whose evidence was efficacious in cutting down D.'s claim under his plea of cross action. *Held*, also, the *postea* being amended, that the costs of D. under his plea of cross action should be deducted, when taxed, from B.'s costs. *Brown v. Dibbs*, 12 N.S.W.S.C.R. (L.), 339. *Martin, C.J.*, *Hargrave and Checke, JJ.* (1874).

N.S.W.

**121.—Certificate for costs—District Courts Act 1858, secs. 101.**—No appeal lies to the Court from the decision of a judge under sec. 101 of the *District Courts Act 1858*. *Jones v. Bates*, 12 N.S.W.S.C.R. (L.), 284, followed. *Siddons v. N.S.W. Shale and Oil Co. Ltd.*, 12 N.S.W.S.C.R. (L.), 364. *Martin, C.J.*, *Hargrave and Faucett, JJ.* (1874). N.S.W.

**122.—Costs — Taxation.**—Five actions of ejectment were brought by different plaintiffs against the same defendant in respect of different measured portions which the plaintiffs claimed under several mineral conditional purchases

made on the same day. Verdicts for the defendant. On taxation of defendant's costs the prothonotary allowed £158 for costs of instructions for brief, and apportioned the amount equally between the five cases, allowing an additional sum of £10 in one case for extra work done on it. *Held*, on motion by the defendant to review taxation, that the prothonotary had power to make an equal apportionment of the costs in question, and that the Court would not interfere with his discretion in making such appointment. *Brown v. Walker* (No. 2), 6 N.S.W.L.R. (L.), 273; 2 W.N., 37. *Martin, C.J., Faucett and Innes, JJ.* (1885). N.S.W.

**123.—Costs—Taxation—Second counsel—Review of disallowance by prothonotary.]—**Where the prothonotary disallowed the costs of second counsel for the defendants in an arbitration in which the plaintiff claimed £138,000, the Court ordered a review of taxation. *North Illawarra Coal Co. v. Commissioner for Railways*, 7 N.S.W.L.R. (L.), 346; 3 W.N., 31. *Martin, C.J., and Innes, J.* (1886). N.S.W.

**124.—Costs—Evidence on commission—Consent—Costs of appearance.]—***See Vale of Clwydd Coal Mining Co. v. Christie*, 4 N.S.W. W.N., 56. *Innes, J.* (1887). N.S.W.

**125.—Costs—Taxation—Arbitration.]—**On an application for a review of taxation it was held that the prothonotary was right in allowing a solicitor who conducted a case before arbitrators a sum of £15 15s. for "instructions to conduct arbitration, involving lengthy perusals of memorandum and articles of association of the *Cobalt Ore Refining Co.*," &c. *Thorpe v. Mills*, 7 N.S.W.W.N., 74. *Foster, J.* (1888). N.S.W.

**125a.—Plaintiff with good cause of action—Champertous agreement with plaintiff no bar to action—Successful plaintiff deprived of costs.]—***See SOLICITOR.*

**125b.—Costs—Taxation by Warden and District Court judge—Goldfields Act 1874, sec. 85—Right of client to withdraw summons for taxation—Offer to accept fixed sum in lieu of taxed costs.]—**Where a client has taken out a summons for the taxation of a solicitor's bill of costs under sec. 85 of the *Goldfields Act* 1874 before a Warden or District Court judge, such Warden or District Court judge may proceed with the taxation on the day appointed in the absence of either party, and neither the client

nor the solicitor can claim to have the taxation stayed without the consent of the other party. The Warden and District Court judge respectively may nevertheless stay proceedings on the summons on sufficient causes shown. A party is not entitled to call upon the advocate for the opposite party to prove express authority to do any act which is within the apparent scope of his authority as such advocate. A solicitor, writing to his clients respecting professional work performed by them in a Warden's Court, and in a District Court on appeal from the Warden's Court, and in the Supreme Court on further appeal, stated his willingness to accept £210 for his professional fees without taxation. The clients refused the offer, and requested him to tax his costs. *Held*, that in rendering his costs for taxation he was not limited to the amount mentioned in the letter. *R. v. Towner; Reg. v. District Court* (at Gympie), *ex parte No. 1 North Phoenix G.M. Co. Ltd.*, 7 Q.L.J., 139. *Griffith, C.J., Cooper and Real, JJ.* (1896). Q.

**126.—Warden's Court—Appeal to Supreme Court—Re-hearing—Costs—N.Z. Mining Act 1886 (50 Vic. No. 51), secs. 250, 256—"Supreme Court Code."]—**In appeals on matters of fact from the Warden's Court, under the *Mining Act* 1886 (50 Vic. No. 51), there is a re-hearing of the case when the provisions contained in Table C. of the third schedule of the Supreme Court Code, with reference to the costs allowed in appeals from inferior Courts, do not apply, the amount of costs to be awarded being in the absolute discretion of the Court. *Sawyer v. Caledonian G.M. Co. Ltd.*, 8 N.Z.L.R., 475. *Conolly, J.* (1890). N.Z.

**127.—Taxation of costs—Settling decree—Appeal—Certiorari.]—***See PRACTICE*, 75.

**128.—Claim for compensation under Mining on Private Property Act 1884 (No. 796)—Costs may be awarded.]—***See COMPENSATION*, 1.

**129.—Costs—Application to amend writ of scire facias.]—***See PRACTICE*, 342.

**130.—Costs—Authority of solicitor to institute proceedings in client's name—Challenge to produce authority—Costs as between solicitor and client.]—***See SOLICITOR.*

**131.—Costs—Official liquidator—Settling list**



—Shares at a discount—Registered contract—  
Illegal association.]—See COMPANY, 372.

131a.—Security for costs—Appeal from Warden—Statement of special case by District Court Judge (Q.)—See PRACTICE, 152b.

132.—Costs—Arbitration Act 1892 (N.S.W.)—  
Company.]—See ARBITRATION, 5, 6.

133.—Company—Solicitor and client—Un-  
authorised proceedings in company's name—  
Costs.]—See COMPANY, 404c, 405.

133a.—Interpleader—Practice—Lien for  
crushing gold—Costs.]—See PRACTICE, 203a.

133b.—Mandamus—Warden functus officio—  
Rule against successor—Costs.]—See PRACTICE,  
266a.

133c.—Costs—Appeal from District Court  
judge and assessors—Appeal on question of  
costs—Goldfields Act 1874 (38 Vic. No. 11), sec.  
74, Regulation 25—Judge's discretion—Order  
for costs part of judgment.]—See PRACTICE, 87a.

134.—Motion to dissolve injunction—Costs.]—  
See PRACTICE, 196.

## XII.—COUNTY COURT.

See COMPANY (WINDING UP); PRACTICE  
(ACTION).

135.—Jurisdiction in trespass on claim—Act  
No. 345, sec. 39—Act No. 291.]—An action for  
trespass on a mining claim may be brought in  
the County Court by a claim-owner, where the  
amount of damages sued for is within the County  
Court jurisdiction. When a County Court judge  
refused to hear such a case, on the ground that  
the plaintiff's remedy was in the Court of Mines,  
under the *Mining Statute* 1865, a rule for a  
*mandamus* was made absolute, to compel him to  
hear the case. *Reg. v. Dunne, ex parte Baillie*,  
3 A.J.R., 118. Banco (1872). V.

## XIII.—COURT OF MINES.

See PRACTICE (APPEAL, CERTIORARI, SPECIAL  
CASE).

136.—Jurisdiction—Wrong-doers.]—*Semble*,  
that the Court of Mines, under the Act No. 32,  
had jurisdiction to grant an injunction applied  
for by one party of miners, mining underneath  
a public street, against another party interfer-  
ing with them, although the land mined upon

could not be held under a miner's right, on the  
principle that those earliest in possession were  
entitled to protection against mere wrong-doers.  
*Re Rogers, ex parte Bunn*, A.R., 25th Nov.,  
1859; A.R., 5th April, 1865. V.

137.—Boundaries.]—A plaint in the Court of  
Mines, under the Act No. 32, sought to have the  
boundaries of the plaintiff's claim defined.  
Defendants asserted a right to a portion of the  
claim, which plaintiffs refused to recognise.  
*Held*, that the plaint should have been dis-  
missed, as it was a suit not really about bound-  
aries, but a suit in which one party denied  
that the other party had any right. *Banks v.*  
*Granville*, 1 W. & W. (L.), 163 (1862). V.

138.—Jurisdiction.]—A judgment obtained in  
the Court of Mines for work and labour done  
was wholly unauthorised, as the Act No. 34  
expressly limited the jurisdiction of the Court  
to matters cognisable in a Court of Equity.  
*Wilson v. Broadfoot*, 1 W. & W. (L.), 215.  
Banco (1862). V.

139.—Boundaries.]—*Semble*, that a decree for  
the settlement of boundaries was beyond the  
power of judges of Courts of Mines under Act  
No. 32, sec. 27, as beyond the powers of Courts  
of Equity. *Albion Co. v. St. George United Co.*,  
4 W. W. & A'B. (M.), 58. *Molencorth, J.*  
(1867). V.

140.—Decree final—Judgment on appeal.]—  
A judge of the Court of Mines by his decree  
declared that the defendants in the suit had  
encroached, and that accounts should be taken,  
and that defendants should pay plaintiffs what  
was due. On appeal, the Chief Judge of the  
Court of Mines varied the decree only as to the  
extent of the encroachment, and remitted it so  
varied to the judge who made it, who proceeded  
to take accounts. On motion for prohibition to  
restrain the judge from taking accounts on the  
ground that he made his final decree before the  
appeal, and could do nothing further: *Held*,  
that sec. 145 of Act No. 291 contemplates only  
one decree, and it is enforceable at once, unless  
appealed from. Under sec. 174 the Chief Judge  
must so decide that the carrying out of his  
decree shall be a purely ministerial proceeding.  
Taking accounts is not a purely ministerial pro-  
ceeding; it is quasi-judicial. The order appealed  
from is to be simply enforced without any other  
judicial act. Rule absolute for a *certiorari*. *Reg.*



v. *Rogers*, 5 W.W. & A'B. (L.), 206. Banco (1868). V.

141.—**Concurrent jurisdiction.**—The Court of Mines and the Supreme Court have concurrent jurisdiction on certain subjects, and so far as the Courts of Mines decide cases their decisions cannot be altered or varied by the Supreme Court—by way of review—for error, or for further discovery of evidence; and, as to cases pending in the Court of Mines, their pending, if relied upon, should stop the jurisdiction of the Supreme Court on the same subject. *United Working Miners' G.M. Co. v. Prince of Wales G.M. Co.*, 6 W.W. & A'B. (E.), 25. *Molesworth, J.* (1869). V.

142.—**Supreme Court—Co-ordinate jurisdiction.**—Titles to mining claims and leases existed before, but were placed on a different footing by the Act No. 291, which created the present Courts of Mines. The Supreme Court has a concurrent jurisdiction with the Courts of Mines as to these titles, which however is generally not concurrently exercised in matters within their jurisdiction; and, on this ground, a demurrer was allowed to a bill in equity, which put matters forward which could have been used as a defence to a plaint instituted by the defendants against the plaintiffs in a Court of Mines, for to entertain the bill would have caused inconvenience, and no counterbalancing convenience was alleged. *Gunn v. Harvey*, 1 V.L.R. (E.), 111. *Molesworth, J.* (1875). V.

143.—**Mining Statute 1865 (No. 291), sec. 163—Inspection of books of company not party to suit.**—The judge of a Court of Mines has no power in a suit between two companies to order the defendant company to produce for inspection books of another company not a party to the suit. *Park Co. v. South Hustler's Reserve Co.*, 8 V.L.R. (M.), 37. *Molesworth, J.* (1882). V.

144.—**Mining on Private Property Act 1884 (No. 796), secs. 18, 22, 27—Claim for compensation—Procedure.**—See COMPENSATION, 1.

145.—**Appeal from Court of Mines—Winding up of company.**—See PRACTICE, 78.

#### XIV.—DECLARATORY ORDER.

146.—**Declaratory order—Warden's jurisdiction to make—Non-compliance with covenants in lease.**—A Warden has no jurisdiction to make a merely declaratory order that the holder of a

mining lease has not complied with the labour covenants contained in it. *Ives v. Lalor*, 13 V.L.R., 941; 9 A.L.T., 98. *Webb, J.* (1887). V.

147.—**Judicature Act 1883 (No. 761), sec. 9, sub-sec. 5 (b), (Supreme Court Act 1890 [No. 1142], sec. 63, sub-sec. 5 [b])—Declaratory order—Jurisdiction of Warden.**—The provisions of sec. 9, sub-sec. 5 (b) of the *Judicature Act 1883* (No. 761), as to the pronouncing of a declaratory judgment, apply only to the Supreme Court, and therefore do not give a Warden or any other inferior Court jurisdiction to do so. *Ives v. Lalor*, 13 V.L.R., 941, at p. 944; 9 A.L.T., 98. *Webb, J.* (1887). V.

#### XV.—DECREE.

148.—**Settling decree—Taxation of costs—Appeal—Certiorari.**—See PRACTICE, 75.

#### XVI.—DISCRETION.

149.—**Discretion of Warden—Appeal.**—See PRACTICE, 411.

#### XVII.—DISMISSAL.

See PRACTICE, 21.

150.—**Dismissal of claim—Right to file new claim—Partnership—Allegations of fraud not proved.**—See PARTNERSHIP, 26.

#### XVIII.—DISTRICT COURT.

151.—**District Court—Company's residence—22 Vic. No. 18, sec. 5—Jurisdiction—Prohibition.**—The plaintiff brought an action in the District Court against the defendant company at Newcastle to recover damages for injuries sustained whilst sinking a shaft on land belonging to the company in the Newcastle district. The company's registered office was in Sydney. Objection was taken to the jurisdiction. The judge decided he had jurisdiction, heard the case, and found a verdict for the plaintiff. *Held* (on application for a prohibition), that as the residence of the company was a question of fact, the Court could not grant a prohibition, as it was not shown that the judge had perversely decided the question or that he had proceeded on a wrong principle of law; and, further, that the District Court judge was right in deciding on the facts before him that the company was

resident in the Newcastle district. *Holburd v. Burwood Extended Coal M. Co.*, 11 N.S.W.L.R. (L.), 365; 7 W.N., 70. *Darley, C.J., Stephen and Foster, JJ.* (1890). N.S.W.

152.—District Court—Appeal—New trial—44 Vic. No. 30.]—In an action for negligence in the District Court the judge refused a nonsuit moved for on the ground that there was no evidence of negligence. The jury having found a verdict for plaintiff, the defendants moved the District Court judge for a new trial on the ground that there was no evidence to support the verdict. The application was refused, and the defendants, without appealing from this decision, moved the Full Court by way of rule *nisi* under 44 Vic. No. 30, to enter a nonsuit or verdict upon grounds substantially the same as those upon which the District Court judge had been moved for a new trial. The Court dismissed the appeal on the ground that whilst the order of the District Court judge refusing a new trial stood unappealed against, they could not make an order which would over-rule it. *Wilson v. Sunlight G.M. Co.*, 12 N.S.W.L.R. (L.), 237; 8 W.N., 75. *Windeyer, Innes and Stephen, JJ.* (1891). N.S.W.

152a.—Mining Act (37 Vic. No. 13), secs. 78, 106—Schedule XI.—Appeal from Warden—Minute of decision—Jurisdiction of District Court.]—The District Court has no jurisdiction to hear an appeal from a Warden unless a certified copy of the Warden's decision is produced under sec. 106 of the *Mining Act*. The production of the register containing an entry of the Warden's order, but not of his decision, is not sufficient. Decisions of *Molesworth, J.*, in *Crocker v. Wigg*, 5 W.W. & A'B. (M.), 20; and *Whiteman v. McGallan*, 6 W.W. & A'B. (M.), 32, approved. *Ex parte Lucas*, 8 N.S.W.W.N., 33. *Darley, C.J., Windeyer and Stephen, JJ.* (1891). N.S.W.

152b.—Goldfields Act 1874 (38 Vic. No. 11), sec. 74—Appeal from Warden—Security for costs—Statement of special case by District Court judge—District Courts Act 1891, sec. 144.]—Sec. 144 of the *District Courts Act* 1891, providing for security of costs on an appeal, does not apply to a special case stated by a District Court judge under sec. 74 of the *Goldfields Act* 1874. *Drury v. Brown*, 7 Q.L.J., 14. F.C., *Griffith, C.J., Cooper and Real, JJ.* (1896). Q.

153.—District Court (Q.)—Jurisdiction—Min-

ing company—Action for forfeiture of shares.]—See COMPANY, 252.

153a.—District Court—Warden—Taxation—Costs—Goldfields Act 1874, sec. 85.]—See PRACTICE, 125b.

154.—Power of District Court to amend summons on appeal from Warden.]—See PRACTICE, 442.

154a.—Rule nisi for prohibition—Effect of appeal pending in District Court.]—See PRACTICE, 330a.

155.—Appeal from Warden's Court—District Court—When constituted.]—See PRACTICE, 443.

#### XIX.—ENLARGING SUMMONS.

155a.—Enlarging time for notice of appeal.]—See PRACTICE, 74.

#### XX.—EXECUTION.

156.—Warden—Jurisdiction to restrain execution.]—*Semble*, that a Warden has jurisdiction to restrain the improper issuing of an execution out of his own Court. *Great Republic G.M. Co. v. Hussey*, N.Z.L.R. 5 S.C., 126. *Prendergast, C.J.* (1886). N.Z.

157.—Order for inspection—Alleged encroachment—Motion for attachment—Obstacles presented by defendant to order being availed of.]—See MINE, 3.

158.—Decree to transfer mining share—Non-compliance—Attachment.]—See ATTACHMENT.

159.—Execution—Failure in, of mineral leases—Cancellation—Regulations.]—See LEASE, 53.

159a.—Execution of foreign judgment—Company registered in Victoria—Assets in N.S.W.]—See PRACTICE, 171a.

160.—Refusal of Warden to issue execution—Mandamus.]—See PRACTICE, 269.

161.—Action against Warden—Refusal to issue execution.]—See PRACTICE, 214.

162.—Refusal of Warden to issue execution—Judicial act.]—See PRACTICE, 214.

163.—Taking claim in execution—Interpleader—Title to land—Jurisdiction.]—See PRACTICE, 204.

164.—Mines Act 1877 (N.Z.), (41 Vic. No. 42),

sec. 96.—Claim may be taken in execution.]—  
See CLAIM, 39.

165.—Presumption of due execution of instrument—Seal of company.]—See COMPANY, 168.

#### XXI.—FOREIGN ATTACHMENT.

166.—Absent Defendants Act (4 Vic. No. 6)—Foreign corporation.]—The provisions of the *Absent Defendants Act* apply to the case of a foreign corporation. *Brown v. Melbourne and Newcastle Minni Colliery Co. Ltd.*, 4 N.S.W. S.C.R. (L.), 36 (1864). N.S.W.

#### XXII.—FOREIGN CORPORATION.

167.—Foreign corporation—Action against—Contract—Domicile—Branch office—Agency—Manager—Service of writ—C.L.P. Act 1853, sec. 14.]—If a foreign corporation having a branch office in New South Wales carries on business there in such a way as to be resident for the purpose of service of process, then such corporation can be properly sued in New South Wales for every cause of action arising there on which a home corporation may be sued. *Great Cobar Copper M. Co. v. Comptoir D'Escompte de Paris*, 10 N.S.W.L.R. (L.), 55; 5 W.N., 100. *Darley, C.J., Stephen and Innes, JJ.* (1889). N.S.W.

#### XXIII.—FOREIGN JUDGMENT.

168.—Foreign judgment—N.Z. judgment for calls.]—Defendant had been a shareholder in the Dayspring G.M. Company, the scene of operations being in New Zealand, where the company was registered. In 1869 the defendant sold out, and the shares were duly transferred to and registered in the names of the purchasers. The defendant left New Zealand in 1870. The company was wound up in 1871, and the defendant was put on the list of contributories. The official agent applied for payment of a call to a person appointed to collect the rents of the defendant in New Zealand, who paid the sum demanded. The defendant never authorised or ratified the payment. A further call was made, and not paid. £67 7s. was then demanded from defendant's agent, and that sum not having been paid judgment was got in the District Court against defendant for £72 10s. 6d. That was made a judgment of the Supreme Court of New Zealand, and a memorial of it was filed (under sec. 2 of 19 Vic. No. 12) in the Supreme Court

of New South Wales. Defendant's affidavit stated (uncontradicted) that he had never been served with any process, nor had he heard of the proceedings till after judgment was obtained. On an application to a judge an order was obtained granting liberty to plaintiff to issue execution on that judgment. On a motion to set that order aside: *Held*—(1.) That the Court had power to entertain the motion. (2.) That the plaintiff's signature need not be verified by affidavit. (3.) (*Hargrave, J., diss.*), that as the defendant did not reside in New Zealand when the action was commenced, and as no process or notice had been served on him, the order should be set aside. *Warner v. Fischer*, 13 N.S.W. S.C.R. (L.), 346. *Martin, C.J., Hargrave and Faucett, JJ.* (1875). N.S.W.

169.—Foreign judgment—Married woman with separate estate—Non-joinder of husband—Creditors Remedies Act (19 Vic. No. 12).]—A judgment obtained in Victoria in an action for the price of mining shares, in which the husband was not joined, against a married woman with separate estate, will not be enforced in New South Wales notwithstanding that the defendant appeared and unsuccessfully defended such action. *Marks v. Casey*, 7 N.S.W.W.N., 35. *Foster, J.* (1890). N.S.W.

170.—Foreign judgment—Supreme Court of Queensland—19 Vic. No. 12.]—See *Glanmore and Monkland G.M. Co. v. Buckland*, 1 N.S.W. W.N., 92. *Faucett, J.* (1884). N.S.W.

171.—Foreign judgment—Creditors Remedies Act (19 Vic. No. 12)—Miners' rights in New Zealand—Residence in New South Wales.]—This was an application for leave to enter up judgment upon a memorial of a judgment of the Supreme Court of New Zealand for goods supplied to defendant's manager. To this action defendants had not appeared, and judgment had been signed against them on default. Defendants resided in New South Wales, but held miners' rights in New Zealand, and worked in partnership with residents of New Zealand a mining claim and crushing machinery. Execution under 19 Vic. No. 12 refused, following *Brisbane Oyster Fishery Co. v. Emerson*, Knox, 80. *Smith v. Campbell*, 7 N.S.W.W.N., 10. *Foster, J.* (1890). N.S.W.

171a.—Execution on foreign judgment—Company registered in Victoria—Assets in New

**South Wales.]—**Order made to issue execution in New South Wales under 19 Vic. No. 12 on a judgment obtained in Victoria by a married woman against a no-liability company registered in Victoria, but whose land was in New South Wales. *Dean v. Rising Moon G.M. Co.*, 10 N.S.W.W.N., 77. *Foster, J.* (1893). N.S.W.

#### XXIV.—GROUNDS OF APPEAL.

**171b. — Appeal or rehearing — Grounds of appeal—**Mining Statute 1865 (V.), sec. 216.]—*See PRACTICE*, 51.

#### XXV.—INFORMATION.

**172.—Information—Remedy for unauthorised possession of Crown lands.]—***See CROWN LANDS*, 24.

**172a.—Warden's Court—Recovery of penalty — Information or complaint.]—***See PRACTICE*, 441.

#### XXVI.—INJUNCTION.

**173. — Omission of the words "servants, agents, or workmen."]**—The omission of the words "servants, agents, and workmen" in an injunction does not diminish the responsibility of those to whom the injunction is directed for the acts of their servants, though it may perhaps diminish the responsibility of the servants for their own acts. *Lane v. Hannah*, 1 W. & W. (E.), 72. *Molesworth, J.* (1861). V.

**174.—Order made out of district—Irregularity.]—**Under the Act No. 32 an injunction order made by the judge of a Court of Mines outside his district was held to be bad. *James v. Higgans*, 1 W. W. & A'B. (L.), 54. *Banco* (1864). V.

**175.]—**Where an application was made to the Court of Mines to dissolve an injunction, and another application by the other party was made to vary it, and the Court refused both motions, but made an order for an injunction similar to the one first obtained: *Held*, that such a course was irregular, and the appeal against the injunction was allowed. *Ibid.* V.

**176.—Pending appeal from Warden.]—***Semble*, that under the Act No. 32 a judge of the Court of Mines could grant an injunction in an appeal from the Warden pending the hearing of the appeal. *Dennis v. Vivian*, 1 W. W. & A'B. (L.), 201. *Banco* (1864). *See Act No. 291*, sec. 164. V.

**177.—Frontage claims.]—**"In that case—*M'Gill v. Tatham*, Supreme Court, 18th May, 1865—the holders of a frontage claim sought an injunction against claimants for block claims mining and registered within their area. The lead had not been found at all, and it was probable it might pass through the block claim. The Court decided upon that ground that the injunction should be awarded to protect the holders of the frontage claims from embarrassment and confusion. The Court relied much on the course of the lead being in no way ascertained, and the holders of the frontage claim being in no default as to delay, but said nothing as to what should be done if the opposite of those facts were presented. Upon an injunction motion these facts might be regarded independently of the legal rights of the parties."—*Per Molesworth, J. United Extended Band of Hope Co. v. Tennant*, 3 W. W. & A'B. (M.), 51. (1866). V.

**178. — Attachment.]—**No person is to be attached for contempt of Court when he merely exercises his right to the utmost, which he thinks he is justified under the orders of the Court in doing, if those orders admit of two constructions, one of them being consistent with his view of his rights. *Asley United G.M. Co. Regd. v. Cosmopolitan G.M. Co. Regd.*, A.R., 1st Oct., 1867. V.

**179. — Breach.]—**If an injunction is against doing mischief, and the works cannot go on without doing some mischief, the works must be stopped or the injunction will be regarded as broken, and the persons will be visited with the penalties for that breach. *Bonshaw Co. Regd. v. Prince of Wales G.M. Co. Regd.*, 5 W.W. & A'B. (E.), 140 (1868). V.

**180. — When equity doubtful.]—**When the plaintiff's equity is doubtful, an injunction ought not to be granted. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.), 164. Full Court (1868). V.

**181.—Title—Estoppel—Agreement.]—**A., B. and C., three mining companies, entered into an agreement respecting certain land in dispute between them. They agreed that this land should become the property of another company, D. The ground to be occupied by D. was described on a plan by two lines, one showing the northern boundary and the other the western;

and it was agreed that D. should not work to the north or west of these lines. D. did work to the north of the northern boundary. B. applied for an injunction to restrain D. from working on the ground to the north of the northern boundary, which ground was claimed by B. *Held*, that as B. company by their bill showed no title to the ground by possession or otherwise, and as they rested their case solely on the agreement, as an estoppel to prevent D. from questioning their title, an injunction should not be granted. *Band of Hope and Albion Consols v. St. George United Co.*, 1 A.J.R., 174. Full Court (1870). V.

182.—Colour of title—A *prima facie* case necessary to entitle party to injunction—Object of injunction.]—B. applied for an injunction against A. to prevent A. working a certain mining tenement claimed by B. Part of the land claimed by B. consisted of a street called Pleasant Street, under which C. was mining. It appeared that C. had strong colour of title to the land in question, except the street, while B. had some colour of title to the street. There was a question whether the street was exempt from mining operations, as applied to public purposes, or withdrawn by proclamation. *Molesworth, J.*, in giving judgment, said—"For interlocutory purposes I think I may properly stop the defendants, if the plaintiffs submit to be stopped also as to Pleasant Street. Order—If the plaintiffs consent, cross injunctions as to Pleasant Street." *Held*, on appeal, that B. was entitled to an absolute injunction as to Pleasant Street. *Band of Hope and Consols Co. v. All Saints Co.*, 2 A.J.R., 37. *Molesworth, J.* and F.C. (1871). V.

182a.]—The Court, by granting an injunction, does not necessarily determine the suit; it only keeps intact and inviolate property which might otherwise, pending the final decision of the Court, be destroyed. To obtain an injunction, however, a plaintiff must show a *prima facie* case that he may ultimately succeed, although it need not follow that he will succeed. *Ibid*, 2 A.J.R., 49. F.C. (1871). V.

183.—Ex parte—Irreparable damage.]—An *ex parte* injunction to restrain a defendant from mining, allowed under the *Common Law Procedure Act* (No. 274), sec. 242, will be set aside if the party obtaining it has not fully and clearly stated facts sufficient to show that irreparable damage is likely to accrue if the injunction be

not granted. *Ridd v. Chibnall*, 4 V.L.R. (L.), 490. *Stavell, C.J.*, and *Barry, J.* (1878). V.

184.—Mining Statute 1865—Act No. 291, sec. 203—Parties—Notice—Title—Evidence—Manager—Miners' rights—Special case—Costs.]—When two parties by the same notice apply for an injunction under the Act No. 291, sec. 203, and only one of such parties appears on the hearing, the Warden should dismiss the application. *Quare*, has the Warden power to amend by striking out name of party not appearing? When, on such an application, the evidence of the applicant's title is a recent transfer, it requires corroboration, i.e., the title of the transferor. Mere marking out, and registration of claim by a defeated complainant for forfeiture, would not be an answer to an application for injunction against him. And, *semble*, evidence of the proceedings for forfeiture could not be given by parol on application for injunction if objected to. When a claim has been transferred to the manager in trust for an incorporated company, and the manager has miners' rights in his own name, he cannot apply for injunction in his own name under the Act No. 291, sec. 203. On special cases costs will not be given against a Warden unless specially asked in the rule *nisi*. *Grant v. Lawlor*, 3 V.L.R. (M.), 15. *Molesworth, J.* (1877). V.

185.]—Plaintiffs obtained an injunction against defendant in an encroachment suit. After injunction granted defendant purchased the interests of some of the plaintiffs, and continued mining regardless of the injunction. On motion to commit him for alleged breach: *Held*, that the motion must be refused, as he ought not to be punished for doing that which some of the plaintiffs had allowed him to do. *Attorney-General v. Boyd*, 4 A.J.R., 103. *Molesworth, J.* (1873). V.

186.—Sequestration for breach—Act No. 274, sec. 243.]—The property of a registered mining company may be sequestered for disobedience of an injunction, and the property mentioned in Act No. 274, sec. 243, is the property of the corporation. On moving for a rule for sequestration, the writ of injunction must be produced to the Court. *Parade G.M. Co. v. Black Hill S.E. G.M. Co.*, 5 A.J.R., 85. Banco (1874). V.

187.]—In cases of encroachment an order for inspection will not be granted when there are

other means open to the parties of obtaining the required information. *Band of Hope Co. v. Williams Freehold Co.*, 5 V.L.R. (E.), 257. *Molesworth, J.* (1879). V.

**188.—Injunction—Inspection—Encroachment—Proving different case from that made by bill.]**—The plaintiffs, by their bill and affidavits, made a case of recent encroachment by the defendant company on the plaintiff's mine, by means of branch drives. They failed in substantiating such encroachment, and then endeavoured to prove a different case of encroachment by the defendant's main drive, which was constructed five years previously. *Held*, that they were not entitled to prove a different case from that originally put forward, and motion for injunction and inspection dismissed with costs. *Parker's Freehold United Quartz Mining Co. v. Parker's United Co.*, 7 V.L.R. (E.), 16; 2 A.L.T., 130. *Molesworth, J.* (1881). V.

**189.—Interlocutory Injunction—Title—Mining—encroachment—Acquiescence.]**—Interlocutory injunction, to restrain a trespass to a mine, refused where the plaintiffs, or those through whom they claimed, were aware of the defendants having worked on the ground in question for two years, and had taken no previous steps to stop them. If a person believes that his land is encroached upon, he should ascertain what its boundaries are, and if a person comes near his boundary to sink a shaft, he should take immediate steps to assert his claim and prevent encroachment. *Band and Barton United Co. v. Young Band Extended Q.M. Co.*, 7 V.L.R. (E.), 162. *Molesworth, J.* (1881). V.

**190.—Injunction—Securing the gold.]**—An injunction was obtained *ex parte* against a "no liability" company to restrain it from working on ground which was claimed by both plaintiff and defendant company. This injunction was subsequently dissolved by the primary judge (*Molesworth, J.*), on the ground that it was obtained by misrepresentation; but the defendant company was ordered to keep an account of the gold taken by it from the land, the primary judge refusing the request of the plaintiff for an order that the gold obtained by the defendant should be paid into a bank. *Held*, by the Full Court (*Stavell, C.J., Williams and Holroyd, JJ.*) on appeal, that the plaintiff company was entitled to an order directing the

surplus of the gold over and above the working expenses to be paid into a bank in the joint names of the managers of the plaintiff and defendant companies, the plaintiff company having liberty at all reasonable times, at their own expense, to inspect the workings of the defendant company on the land. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 8 V.L.R. (E.), 120; 3 A.L.T., 125 (1882). V.

**191.—Injunction—Breach of order—Mixing quartz.]**—Where there was an order against a defendant company that they might continue to work auriferous land the title to which was in dispute in the suit, on the terms of keeping an account of the gold extracted and paying into a bank named the surplus proceeds of it after working expenses, and the defendant company worked the land in dispute in conjunction with adjoining land of their own and mixed quartz so obtained before extracting the gold from it, and then paid into the bank a proportionate part of the gold obtained from the quartz so mixed: *Held* (*per Molesworth, J.*), that that was not a substantial breach of the order, and that if it were the plaintiffs proper course was to apply to vary the order, or to proceed against the defendant company for contempt. But, *held per* the Full Court (*Stavell, C.J., Williams and Holroyd, JJ.*) on appeal, that the defendant company had committed a distinct breach of the order, and defendant company ordered to pay into the bank the whole of the gold the proceeds of the quartz they had so mixed. *Band of Hope and Albion Consols Co. v. Young Band Extended Q.M. Co.*, 8 V.L.R. (E.), 277; 4 A.L.T., 60 (1882). V.

**192.—Injunction—Minister of Crown—Petition of right—20 Vic. No. 15—24 Vic. No. 7.]**—Injunction refused to prevent Minister of Works from acting in violation of agreement between plaintiffs and him as agent of the Crown. *Held*, that under the circumstances, a petition of right was the only remedy. *Newcastle Wallsend Coal Co. v. Arnold*, 2 N.S.W.S.C.R. (E.), 26. *Stephen, C.J., Milford and Wise, JJ.* (1863). N.S.W.

**193. — Injunction — Action against wrong defendant—Suing agent of mining company—Execution against company—Absent Defendants Act.]**—A. brought an action (under *Absent Defendants Act*) against B., as the agent of a

mining company called C., and issued execution upon the plant, &c., of a corporation called C. (Limited), and there was no dispute that the debt was due by it. *Held*, that the action was not against C. (Limited), and that the debt did not justify the seizure. Injunction granted to restrain the sale. (*Wise, J., diss.*) *Melbourne and Newcastle Minmi Colliery Co. Ltd. v. McLean*, 3 N.S.W.S.C.R. (E.), 105. *Stephen, C.J., Milford and Wise, JJ.* (1864). N.S.W.

**193a.**—Mining business—Interim injunction to restrain working.]—As a general rule in the case of a mining business it is more convenient to grant an interim injunction to keep matters *in statu quo* till the hearing, than to direct an account of dealings to be kept. "It is not like the case of an ordinary commercial business; there there is no very great difficulty in the keeping and checking the account. But in the case of a mine it means keeping a check over the amount of ore taken out of the mine, following that ore to the battery, and seeing what return it gives on the crushing. The plaintiff could not possibly have any adequate control over all these operations so as to be able to check their accuracy. It, therefore, appears to me that the granting of the injunction is the more convenient course. If the defendants were allowed to go on working the mine, I think the plaintiff might be unduly prejudiced."—*Per Owen, J. Barclay v. Neeld*, 11 N.S.W.W.N., 9 (1894). N.S.W.

**194.**—Crown grant—Reservation of minerals—Trespass—Injunction.]—*See LEASE*, 68.

**195.**—Injunction—Notice of—Contempt.]—What constitutes sufficient notice to directors of a mining company of an injunction restraining them from paying over dividends having been granted to warrant their being committed for a contempt of Court on breach? *Attorney-General, ex relatione Mills v. Hughes*, 1 S.A.L.R., 27. *Hanson, C.J., and Gwynne, J.* Equity (1867). S.A.

**196.**—Injunction—To dissolve costs of motion.]—*Attorney-General, ex relatione Mills v. Hughes*, 1 S.A.L.R., 27, at p. 31. *Hanson, C.J., and Gwynne, J.* Equity (1867). S.A.

**197.**—Lateral support—Injunction—Title—Possession.]—On an application for an injunction in an action for injury to lateral support to restrain the defendant from continuing or repeating acts calculated to affect injuriously the

plaintiff's land, the plaintiff may rely on his possession merely, without showing in what way he has acquired a right to mine, under the *Goldfields Act 1866* (30 Vic. No. 32). *Great Extended Sluicing Co. v. Hales, Mac.* 896. *Chapman, J.* (1871). N.Z.

**198.**—Injunction—Election of directors—Rival boards of directors—Sham suit in name of company.]—*See COMPANY*, 68.

**199.**—Injunction—Patent—Infringement of gold mining machinery.]—*See PATENT*, 2.

**200.**—Injunction—Contract for sale of severed chattels—Specific performance—Contract involving continuous acts.]—*See SPECIFIC PERFORMANCE*, 1.

**201.**—Injunction—Compensation—Breach of statutory contract with reference to construction of railway.]—*See STATUTE*, 4.

**202.**—Injunction—Equity Act 1880, secs. 4, 57—Breach of covenant of quiet enjoyment—Pastoral lease.]—*See CROWN LANDS*, 22.

**203.**—Injunction—Secretary of company—Masters and Servants Act 1863—Contract—Winding up.]—*See EMPLOYER AND EMPLOYEE*, 9.

## XXVII.—INTERPLEADER.

**203a.**—Interpleader—Practice—Lien for crushing gold—Costs.]—Gold was deposited with the defendant bank for safe custody. The plaintiffs alleged that they had deposited it. After it was deposited, P. gave notice to the bank not to hand it over without his authority. The bank refused to deliver it to the plaintiffs, and the plaintiffs then brought an action of trover. The defendants asked for an interpleader order, alleging that the gold had been deposited by the plaintiffs and P. P. swore that he had a lien on the gold for the costs of crushing it, and that he, and not the plaintiffs, had deposited the gold. *Held*, that the order should go, that the costs of the bank should be paid by the party unsuccessful in the action, and that the costs of the bank should be a first charge on the gold. *Nolan v. London Chartered Bank*, 8 N.S.W.W.N., 127, followed. *Bray v. Bank of Australasia*, 13 N.S.W.W.N., 32. *Cohen, J.* (1896). N.S.W.

**204.**—Taking claim in execution—Interpleader—Title to land—Jurisdiction.]—*Semble*, that where a claim has been taken in execution a



magistrate in New Zealand has jurisdiction to entertain an interpleader summons, notwithstanding that a question of title to land is involved. *Campion v. Turton*, N.Z.L.R. 3 S.C., 337. *Williams, J.* (1882). N.Z.

#### XXVIII.—INTRUSION (WRIT OF).

205.—Writ of intrusion — "Office found" — Adverse possession against Crown—21 Jac. I. c. 14.]—See CROWN LANDS, 8.

206.—Writ of intrusion—Nullum Tempus Act.]—See CROWN, 16.

207.—Pleading—No allegation of title.]—See POSSESSION, 5.

208.—Intrusion—Statutes of Limitation.]—See CROWN, 6.

209.—Writ of intrusion—Remedy for unauthorised possession of Crown lands.]—See CROWN LANDS, 24.

#### XXIX.—IRREGULARITY.

See PRACTICE, 350.

#### XXX.—ISSUES.

See TRESPASS, 7.

#### XXXI.—JUDGE.

See COMPANY, 309, 315, 330; PRACTICE, 45, 61; See also PRACTICE (JURISDICTION).

#### XXXII.—JUDGMENT.

See COMPANY; FORFEITURE.

210.—Judgment.]—A judgment recovered in the Court of Mines, but afterwards set aside on appeal, is no bar to an action in the County Court for the same cause of action. *Wilson v. Broadfoot*, 2 W. & W. (L.), 97. Banco (1863). V.

211.]—An adjudication of forfeiture or abandonment by the Warden enures only to the party in whose favour the Warden decides. It cannot be taken advantage of by others. *Critchley v. Graham*, 2 W. & W. (L.), 211. Banco (1863). V.

212.—Regulations 16, 19, Regulæ Generales, February 23rd, 1856—Common Law Procedure Act 1857, sec. 91—Judgment for default in not proceeding to trial — "Next sittings."]—See

*Sunny Corner S.M. Co. v. Morgan*, 1 N.S.W. W.N., 91. *Faucett, J.* (1884). N.S.W.

213.—Company—Registration—Winding up—Judgment against official manager.]—See COMPANY, 367.

#### XXXIII.—JUDICIAL ACT.

See PRACTICE (PROTECTION ORDER).

214.—Refusal of Warden to issue execution—Judicial act.]—The issuing of a writ of execution or warrant of distress is a judicial act, and an action for damages does not lie against a Warden for refusing to issue such a writ or warrant. *Lynch v. Wood, Mac.*, 179. *Chapman, J.* (1868). N.Z.

#### XXXIV.—JURISDICTION.

See ACCOUNT; BY-LAWS AND REGULATIONS; COMPANY; LEASE; LIEN; MINER'S RIGHT; PARTNERSHIP; PRACTICE (APPEAL, CERTIORARI, COSTS, COUNTY COURT, COURT OF MINES, INJUNCTION, PROHIBITION, SUPREME COURT, WARDEN, WARRANT); RESIDENCE AREA; ROAD; TRESPASS.

215.—Jurisdiction — Local Courts — Partnership.]—Where the sole right of a local Court in mining partnership concerns was to wind up partnerships by taking disputed accounts, and it assumed to make an order practically introducing a new partner into the partnership in place of another, a rule nisi for prohibition was granted. *Armstrong v. Daly*, 1 V.L.T., 152. *Barry, J.* (1856). V.

215a.—Judge of Court of Mines—Warrant—Amount.]—A judge of a Court of Mines has power on summons to set aside a warrant of execution issued for too much. *Semble*, that an appeal would lie from the order made on such a summons. A warrant of execution issued for too much is bad altogether. *See Q.M. Co. v. Sea Queen Q.M. Co.*, 5 A.J.R., 112. *Molenworth, J.* (1874). V.

216.—Mining Statute 1865.]—*Semble*, that wherever by any other Act jurisdiction is conferred on the Court of Mines the provisions of the *Mining Statute 1865*, if applicable, attach. *Colonial Bank v. Willan*, 5 A.J.R., 53. J.C. (1874). V.

217.—Warden—Act No. 291, secs. 177, 101, sub-sec. 3.]—A Warden has no jurisdiction to



entertain a plaint for damages for the illegal forfeiture of shares in a registered mining company. *Newey v. Garden Gully United Q.M. Co.*, 5 A.J.R., 116. *Molesworth, J.* (1874). V.

218.—Warden—Act No. 446, sec. 23—Special case.]—An order pronounced by a Warden after he has refused to state a case for the opinion of the Chief Judge is completely *ultra vires*. Act No. 446, sec. 23. *Reg. v. Thompson, ex parte Costin*, 4 V.L.R. (L.), 515. *Banco* (1878). See *Lang v. Costin*, A.R., June 3rd, 1878. V.

219.—Mining Statute 1865 (No. 291), secs. 36, 101 (3), 177—Water right license—Jurisdiction of Warden.]—A Warden has jurisdiction under the *Mining Statute* 1865 (No. 291), sec. 101, subsec. 3, and sec. 177, to hear a complaint by the holder of a water right license for the diversion or abstraction of water from his source of supply. *Trahair v. Rocky Mountain Extended G.M. Sluicing Co.*, 11 V.L.R., 231. *Molesworth, J.* (1885). V.

220.—Mining on Private Property Act 1884 (No. 796), secs. 18, 19, 21—Assessing amount of compensation—Jurisdiction of Warden to state special case.]—In assessing the amount of compensation to be awarded to the owners of land under the *Mining on Private Property Act* 1884 (No. 796), a Warden acts in his judicial capacity as Warden, and not as a mere *persona designata* for assessing compensation. He may, therefore, as such Warden, state a special case under the *Mining Statute* 1865 (No. 291), for the opinion of the Court. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

221.—Up to what time Warden may state special case.]—A Warden has jurisdiction to state a special case for the opinion of the Supreme Court, on an application made immediately after he has orally delivered a reserved judgment, but before he has entered it. *Lang v. Costin*, 4 V.L.R. (L.), 512 (see PRACTICE, 218), distinguished and explained. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174. *Webb, J.* (1887). V.

222.—Jurisdiction of Supreme Court—Mining company carrying on operations out of colony—Registered office in colony—Mining district—Winding up—Mining Companies Act 1871 (No. 409), secs. 59, 61—Mining Companies Act 1886

(No. 881), sec. 2.]—The Supreme Court has no jurisdiction to order the winding up of a mining company registered under the *Mining Companies Act* 1871 (No. 409), and having its registered office in a mining district of the colony of Victoria, but carrying on its operations out of the colony. *In re Paroquet G.M. Co. No Liability*, 15 V.L.R., 609. *Hodges, J.* (1889).

223.—Jurisdiction of Supreme Court—Mining company carrying on operations out of Victoria—Registered office in Victoria—Mining district—Winding up—Mining Companies Act 1871 (No. 409), secs. 59, 61—Mining Companies Act 1886 (No. 881), sec. 2.]—*Quere*, whether the Supreme Court has jurisdiction to wind up a company carrying on business out of Victoria if the registered office be in Victoria but in a part of the colony which is not within a mining district? *In re Paroquet G.M. Co. No Liability*, 15 V.L.R., 609. *Hodges, J.* (1889). See next case. V.

224.—Mining company carrying on operations elsewhere than in Victoria—Registered office in Victoria—Winding up—Jurisdiction of Supreme Court.]—Where a mining company carries on its operations elsewhere than in Victoria, and has its registered office in Victoria in a place not within any mining district, the Supreme Court has jurisdiction to order the winding up of such company. *In re Tumut Alluvial G.M. Co.*, 19 V.L.R., 391; 15 A.L.T., 54. *Williams, J.* (1893). V.

225.—Mines Act 1890 (No. 1120), secs. 216, 336—Jurisdiction of Warden—Mining on private property.]—The Warden has jurisdiction to deal with leases for mining on private land. *Hawthorne v. Henderson*, 15 A.L.T., 83. *Hood, J.* (1893). V.

226.—Mines Act 1890 (No. 1120), Part II.—Mining on private property—Jurisdiction of Warden to state special case.]—A Warden sitting to take evidence as to an application for a lease to mine on private property, under Part II. of the *Mines Act* 1890 (No. 1120), has no jurisdiction to state a special case for the opinion of the Supreme Court. *In re Smith*, 21 V.L.R., 80; 17 A.L.T., 78; 1 A.L.R., 64 (*sub nom.*, *In re MacDermott*). *Madden, C.J.* (1895). V.

227.—Mines Act 1890 (No. 1120)—General Rules for Proceedings before Wardens, Rule I.—“Subject matter in dispute”—“Interest in land”—

**Jurisdiction of Warden.]**—A tributer sued the lessees of land, held by them from the Crown for mining purposes, for the alleged breach of a tributer's agreement made between them. *Held*, that, irrespective of the question whether the agreement did or did not confer an interest in land upon the tributer within the meaning of Rule I. of the General Rules for Proceedings before Wardens, the "subject matter in dispute" was the breach of the agreement, and was not an interest in land, and that the Warden had consequently no jurisdiction to entertain the complaint, the parties not residing in the district in which the Warden sat. *Morrison v. Teague*, 17 A.L.T., 87; 1 A.L.R., 74. *Holroyd, J.* (1895).

V.

**228.—Mines Act 1890 (No. 1120), secs. 15, 19, 135, sub-secs. 1, 3, 12—Jurisdiction of Warden—Land exempt from occupation—Government road—Trespass—Permit by council.]**—The Warden has jurisdiction to hear a complaint for trespass to a public road, exempt from occupation under sec. 15 of the *Mines Act 1890* (No. 1120), as to which a permit has been given by the local council under sec. 19. *Sims v. Demaniel*, 21 V.L.R., 634; 17 A.L.T., 129, 241; 2 A.L.R., 51. F.C., *Holroyd, a'Beckett and Hood, JJ.* (reversing *Madden, C.J.*), (1895-6).

V.

**229.—Mining company—Action for forfeiture of shares — Jurisdiction — Queensland District Court — Companies Act 1863 (27 Vic. No. 4) — Goldfields Act 1874 (38 Vic. No. 11), sec. 82.]**—The complainant in an action testing the legality of the forfeiture of shares in a gold mining company should take his proceedings in the Supreme Court under the *Companies Act 1863* (27 Vic. No. 4). The District Court has no jurisdiction given to it by the *Goldfields Act 1874* (38 Vic. No. 11), or otherwise, to entertain such an action. *South New Zealand G.M. Co. v. Bullen*, 1 Q.L.J., 50. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1881).

Q.

**230. — Goldfields Act 1874 (38 Vic. No. 11) — Jurisdiction of Warden.]**—The presumption is that a Warden exercising jurisdiction in a district has been properly appointed. *Mathers v. Ellery*, 1 Q.L.J., 129. F.C., *Harding, A.C.J., and Pring, J.* (1883).

Q.

**231. — Goldfields Act 1874 (38 Vic. No. 11) — Jurisdiction of Warden.]**—A Warden when located has all the powers of a Warden without

the necessity of a Warden's Court being proclaimed in the district. *Mathers v. Ellery*, 1 Q.L.J., 129. F.C., *Harding, A.C.J., and Pring, J.* (1883).

Q.

**231a. — Jurisdiction — Warden — Sale of residence area—Goldfields Act 1874 (38 Vic. No. 11), secs. 32, 67.]**—Sec. 32 of 38 Vic. No. 11, does not confer exclusive jurisdiction in the Warden's Court to hear an action for money due on the sale of a residence area. A Small Debts Court has jurisdiction to hear a complaint for the balance of money due in such a case. *Lee Gow v. Williams, ex parte Williams*, 6 Q.L.J., 232. *Cooper and Chubb, JJ.* (1895).

Q.

**231b.—Actions under Employers Liability Act (Q.), (52 Vic. No. 3)—Jurisdiction of Supreme Court.]**—See PRACTICE, 382a.

**232.—Goldfields Act 1866 (30 Vic. No. 32), sec. 62—Jurisdiction of Warden—Forfeiture—Claim—Excess of ground.]**—Where holders under miners' rights, and a Warden's certificate for an extended claim, hold ground in excess of the area authorised by the certificate, a Warden has jurisdiction under sec. 62 of the *Goldfields Act 1866* (30 Vic. No. 32), on a complaint for that purpose, to decree forfeiture of such excess. *Ching Tong Fong v. Lee Chung*, 1 N.Z.J.R., 139. *Chapman, J.* (1873).

N.Z.

**233.—Winding up—Court having jurisdiction.]**—The District Court for the district where it was contemplated that a mining company would carry on operations is the proper tribunal to entertain a petition to wind it up, although no operations have been actually carried on. The Supreme Court has no jurisdiction where there is a District Court for such district. *In re Submarine G.M. Co. Ltd.*, C.L.J., 63; 1 N.Z.J.R. (N.S.) S.C., 37.

N.Z.

**234.—Winding up company—Jurisdiction—Acquiescence in order afterwards impeached—Estoppel.]**—Where contributories had allowed several months to elapse before moving to set aside an order for winding up on the ground of want of jurisdiction: *Held*, that they were not estopped on that account. *In re Submarine G.M. Co. Ltd.*, C.L.J. 63; 1 N.Z.J.R. (N.S.) S.C., 37.

N.Z.

**235. — Taking claim in execution — Interpleader—Title to land—Jurisdiction.]**—*Semble*, that where a claim has been taken in execution

a magistrate in New Zealand has jurisdiction to entertain an interpleader summons notwithstanding that a question of title to land is involved. *Campion v. Turton*, N.Z.L.R. 3 S.C., 337. *Williams, J.* (1882). N.Z.

**236.—Jurisdiction of Warden—Land exempted from occupation for mining purposes—Existing rights.]—**Where land is set apart for village settlement under sec. 21 of the *Land Act* 1877, *Amendment Act* 1879 (N.Z.), (43 Vic. No. 21), and exempted from occupation for mining purposes under sec. 8 of the *Mines Act* 1877 (41 Vic. No. 42), all previously existing rights are unaffected thereby, and the authority of the Warden to deal with such rights is unimpaired. *Turnbull v. Jones*, N.Z.L.R. 3 S.C., 456. *Williams, J.* (1885). N.Z.

**237.—Warden—Jurisdiction to restrain execution.]—***Seem*, that a Warden has jurisdiction to restrain the improper issuing of an execution out of his own Court. *Great Republic G.M. Co. v. Hussey*, N.Z.L.R. 5 S.C., 126. *Prendergast, C.J.* (1886). N.Z.

**238.—Warden's Court—Jurisdiction—Title to land.]—***Seem*, the jurisdiction of the Warden's Court to deal with cases of injuries to land where questions of title are involved is limited to land held under the *Mines Acts* and the *Goldfields Acts*. *McMillan v. Great Extended Sluicing Co.*, N.Z.L.R. 4 S.C., 377. *Williams, J.* (1886). N.Z.

**239.—Mining Act 1891 (N.Z.), (54 & 55 Vic. No. 33), sec. 265—Jurisdiction.]—**Sec. 265 of the *Mining Act* 1891 (54 & 55 Vic. No. 33), takes away the jurisdiction of the Supreme Court in respect of the matters therein specified, and its provisions are compulsory and cannot be waived by litigants. *McConnochie v. Ewing*, 13 N.Z. L.R., 719. *Williams, J.* (1895). N.Z.

**240.—Jurisdiction — Warden — Forfeiture of lease—Mining Statute 1865, secs. 3, 45, 71 (vil.), 101, 177.]—***See* FORFEITURE, 45.

**240.—Warden—Jurisdiction—Action by liquidator for calls—Companies Act 1886, sec. 13.]—***See* PRACTICE, 432a.

**241.—Rival boards of directors—Interlocutory injunction—Sham suit in name of company.]—***See* COMPANY, 67, 68.

**242.—Jurisdiction — Warden — Buildings and**

**fixtures—Mining Statute 1865, secs. 5, 101, 177, 195.]—***See* PRACTICE, 409.

**243.—Warden's jurisdiction to make declaratory order as to non-compliance with covenants in lease.]—***See* COVENANT, 2, 3.

**244.—Jurisdiction of Court to wind up company not having debts.]—***See* COMPANY, 363.

**245.—Jurisdiction of Warden to assess compensation for surface damage.]—***See* COMPENSATION, 8.

**246.— Forfeiture of shares in a mining partnership — Jurisdiction of Warden.] —***See* FORFEITURE, 53.

**247.— Jurisdiction — Of Supreme Court — Appeal to Petty Sessions—Goldfields Act 1866, sec. 21.]—***See* PRACTICE, XXXV.

**248.— Jurisdiction — Of justices — Goldfields Act 1866—Dispute "regarding" partnership.]—***See* PRACTICE, 119.

**249.—Jurisdiction—Supreme Court—Special case from Warden—37 Vic. No. 13, sec. 79.]—***See* PRACTICE, 423.

**250.—Jurisdiction—Warden—Supreme Court —Value of property involved—Miner's right—Insolvent.]—***See* MINER'S RIGHT, 37.

**251.—Jurisdiction to repeal grants—Crown Lands Act 1884, sec. 137—Retrospective.]—***See* PRACTICE, 341.

**252.—Jurisdiction—To amend writ of scire facias—Costs of application.]—***See* PRACTICE, 342.

**252a.—Mining Act (N.S.W.), (37 Vic. No. 13), secs. 78, 106—Schedule XI.—Appeal from Warden —Jurisdiction of District Court—Minute of decision.]—***See* PRACTICE, 152a.

**253.—Jurisdiction—Warden's Court—Mineral license—Mining Act 1874 (N.S.W.).]—***See* PRACTICE, 427.

**254.—Practice — Defective summons — Jurisdiction of Warden—Mining Act 1874 (N.S.W.), sec. 70.]—***See* PRACTICE, 429.

**254a.—Warden—Jurisdiction—Relief granted in excess of powers—Prohibition.]—***See* PRACTICE, 433c.

**255.—Water right—Exchange license—Priorities—Jurisdiction of Warden.]—***See* LICENSE, 22.

256.—Distress—Payment of money into Court—Jurisdiction to determine rights of parties where liquidator's appointment invalid.]—See DISTRESS, 1.

257.—Jurisdiction of Warden to restrain interference with water-race.]—See WATER, 36.

258.—Warden's jurisdiction—Public sludge channel—Unauthorised obstructions—Quia timet actions—Mandatory injunction.]—See PRACTICE, 451.

258a.—Warden's jurisdiction—Mining Act 1891, sec. 125—Application for special claim—Non-completion of survey within time limited by Act—Extension of time—Second applicant.]—See PRACTICE, 451a.

#### XXXV.—JUSTICES.

259—Goldfields Act 1866, sec. 21—Appeal to Petty Sessions final.]—Sec. 21 of the *Goldfields Act* 1866 constitutes two or more justices in any Court of Petty Sessions assembled a Court "to entertain any appeal against any decision made by any justice or justices and assessors relating to any encroachment or trespass under the Act, &c. And no such proceeding shall be quashed for want of form, nor be removed into the Supreme Court by *certiorari* or otherwise." The Petty Sessions Court of Gulgong had dismissed an appeal under sec. 21. *Held*, that the Supreme Court had no jurisdiction to vary or upset the decision of that Court, being an Appeal Court established by sec. 21. Rule *nisi* for prohibition was discharged with costs. *Ex parte Irwin*, 10 N.S.W.S.C.R. (L.), 49. *Stephen, C.J., Hargrave and Faucett, JJ.* (1871). N.S.W.

260.—Goldfields Act 1866, sec. 21—Appeal to Petty Sessions final.]—A decision of the Court of Petty Sessions assembled under sec. 21 of the *Goldfields Act* 1866 (30 Vic. No. 8), is final; and such decision being pleaded amounts to a plea by way of estoppel, or is, at least, a good plea in bar. *Wichern v. Davidson*, 11 N.S.W.S.C.R. (L.), 129. *Stephen, C.J., Hargrave and Faucett, JJ.* (1872). N.S.W.

261.—Goldfields Act 1866—Decision of Court of Petty Sessions—Court of Record—Estoppel.]—*Per Hargrave, J.*, at p. 133:—"The Court established under this Act is in effect a Court of Record, and its decision, therefore, acts as an estoppel." *Wichern v. Davidson*, 11 N.S.W.

S.C.R. (L.), 129. *Stephen, C.J., Hargrave and Faucett, JJ.* (1872). N.S.W.

262.—Justices—Prohibition—Goldfields Act 1866, secs. 5, 14—Goldfield not proclaimed—Miner's right—Jurisdiction.]—See GOLDFIELD, 1.

263.—Justices—Prohibition—Mining Act 1874, sec. 129—Foreibly taking possession—Warden's decision—Evidence.]—See PRACTICE, 422.

264.—Justices—Jurisdiction—Title to land—Crown lands.]—See CROWN LANDS, 21.

264a.—Jurisdiction of justices and assessors—Damages for encroachment—Removal of gold from claim—Distress—Seizure of gold—Goldfields Act (Vict.), (18 Vic. No. 37), sec. 12.]—See TRESPASS, 1.

#### XXXVI.—LIMITATIONS.

265.—Sale of forfeited shares—Limitation of actions after advertisement of sale.]—See COMPANY, 221.

266.—Limitation of action for forfeiture of shares.]—See COMPANY, 222.

266a.—Mine—Trespass by adjoining owner—Statute of Limitations.]—See TRESPASS, 38.

#### XXXVII.—MANDAMUS.

266b.—Mandamus—Warden *functus officio*—Rule against successor—Costs.]—A Warden having refused to hear a case, and having ceased to act as Warden, on an application for *mandamus* the rule was allowed to issue against his successor, and the ex-Warden ordered to pay the costs. *Ex parte Dempsey* (No. 2), 13 N.S.W. W.N., 83. *Simpson and Cohen, JJ.* Banco (1896). N.S.W.

267.—Goldfields Act 1874 (38 Vic. No. 11)—Duties of Warden—Mandamus.]—The duties of a Warden as to receiving, recording and reporting on applications under the *Queensland Goldfields Act* 1874 (38 Vic. No. 11), are simply ministerial, and, therefore, a writ of *mandamus* will lie to compel the Warden to perform such duties. *Davenport's Case* (unreported, 1867), distinguished. "The decision in that case (*Davenport's*) turned upon the principle . . . that the Court could not grant a *mandamus* against a person who, as an inferior ministerial officer, obeyed a power which he was unable to resist."—*Per Harding, J.*, at p. 3. *Ex parte*

*Mills, in re Mills*, 1 Q.L.J., 1. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1881). Q.

268.—*Demurrer—Mandamus.*—*Mandamus* is applicable, and will lie to compel a company to register a transferee of shares. *Favocett v. Inglewood Mining Venture Ltd.*, 6 S.A.L.R., 15. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1872). See COMPANY, 244, 245. S.A.

269.—*Refusal of Warden to issue execution—Mandamus.*—A *mandamus* will lie to a Warden commanding him to issue execution upon an unsatisfied judgment pronounced and recorded by a predecessor in office. *Reg. v. Wood, Mac.*, 553. *Chapman, J.* (1867). N.Z.

270.—*Mandamus—Appeal—Mining Act 1886* (N.Z.), (50 Vic. No. 51), sec. 249—*Frivolous and vexatious complaint—Refusal to go into merits—Decision.*—On the 19th January, 1891, one H. laid a complaint against the defendant E. in the Warden's Court. On 30th January the Warden heard the complaint, and dismissed it with costs. On 18th February the plaintiff laid another complaint against the defendant, which the Warden, without going into the merits, dismissed as frivolous and vexatious, being in his opinion substantially identical with the former complaint. On application for a *mandamus* to compel the Warden to hear the complaint: *Held*, that the action of the Warden in dismissing the complaint as frivolous and vexatious was a decision, and appealable under sec. 249 of the *Mining Act 1886* (50 Vic. No. 51), and that a *mandamus* would not issue. *Rawlins v. Revell*, 11 N.Z.L.R., 380. *Williams, J.* (1891). N.Z.

270a.—*Refusal of Warden to swear assessors—Judicial act—Mandamus.*—See PRACTICE, 430b.

271.—*Mining Partnership Act—Action by "promoter" against "legal" manager—Mandamus.*—See COMPANY, 95.

### XXXVIII.—MANDATORY INJUNCTION.

272.—*Unauthorised obstruction of public sludge channel—Jurisdiction of Warden to grant mandatory injunction.*—See PRACTICE, 451.

### XXXIX.—MINING APPEAL.

273.—*Mining appeal—Mining Act* (37 Vic. No. 39), sec. 79—*Warden—No appearance.*—This

was a special case stated by the Warden at Silverton for the opinion of the Court under sec. 79. As there was no appearance for either of the parties the Court struck the case out. *Per Darley, C.J.*:—"It is not for the Court to give an opinion on what may be an abstract point, for there is nothing to show that the parties have not settled it." *Beech v. Haufe*, 4 N.S.W.W.N., 31. Banco (1887). N.S.W.

### XL.—MINING APPEAL COURT.

274.—*Mining Appeal Court—Appeal from—Value of property for purposes of appeal.*—See PRACTICE, 84.

### XLI.—NEW TRIAL.

275.—*New trial—Verdict demonstrably wrong—Principles on which new trials are granted.*—A new trial should never be granted except where the verdict is such that justice has not been done or such as reasonable men ought not to have found. This was an action for allowing sludge to flow over a portion of plaintiff's land. *Cooper v. Rutherford*, 8 N.S.W.L.R. (L.), 192; 3 W.N., 142; 4 W.N., 8. *Darley, C.J., Faucett and Innes, JJ.* (1887). N.S.W.

275a.—*New trial—Question left to a judge—Decision of question not left to him.*—In an action for wrongful forfeiture of shares, the defendants pleaded acquiescence and delay, and these questions were left by the parties to be decided by the judge. After the hearing, on the motion for judgment, an appeal by the defendants for leave to amend by pleading estoppel was refused by the judge; but the judge, in delivering judgment, allowed the amendment, and being of opinion that the conduct of the plaintiff had amounted to an estoppel, gave judgment for the defendants. *Held*, that as the question of estoppel had not been left by the parties to the judge, he had no power to decide that question, and that a new trial must be had. The decision of *Chubb, J.*, 7 Q.L.J., 99, reversed, and a new trial ordered. *Cashman v. 7 North Golden Gate G.M. Co.*, 7 Q.L.J., 152. *Griffith, C.J., Cooper and Real, JJ.* (1897). Q.

276.—*Shares—Mining company—Rescission—New trial.*—See COMPANY, 226.

277.—*New trial—Evidence—Execution of mineral lease—Crown Lands Acts.*—See CROWN LANDS, 13; LEASE, 49, 50.

278.—New trial—Compensation for lands taken—Mineral contents of land—Onus probandi.]—See COMPENSATION, 9.

279.—District Court—New trial—44 Vic. No. 30.]—See PRACTICE, 152.

280.—New trial—Mistrial—Riparian rights in South Australia.]—See WATER, 16.

281.—New trial—Mining company—Orders for wages—Misdirection.]—See BILL OF EXCHANGE.

## XLII.—NON-JOINDER.

See PRACTICE (PARTIES).

## XLIII.—NULLUM TEMPUS ACT.

282.—Nullum Tempus Act—Lost Crown grant.]—See POSSESSION, 4.

283.—Nullum Tempus Act.]—See CROWN, 6. *Attorney-General v. Love*, 17 N.S.W.L.R. (L.), 16; 12 W.N., 93 (1896). N.S.W.

## XLIV.—ORDER.

See COMPANY (WINDING UP); MINE; PRACTICE, XIV., LXIV.

284.—Goldfields Act (25 Vic. No. 4)—Order by Commissioner—Disobedience.]—Disobedience of an order made by a justice, being a Gold Commissioner under sec. 32 of 25 Vic. No. 4, relating to the mode of working any claim or the due division thereof, is not punishable by fine. *Ex parte Chambers*, 2 N.S.W.S.C.R., 206. *Stephen, C.J., Milford and Wise, JJ.* (1863). N.S.W.

285.—Stay of proceedings—Companies Act 1864.]—Practice as to form of order. *In re Karilla M. Co. Ltd. (Moyle's Case)*, 1 S.A.L.R., 43. *Gwynne, J.* (1867). S.A.

## XLV.—PARTIES.

See CHAMPERTY; COMPANY; FORFEITURE; MINER'S RIGHT; PARTNERSHIP; PRACTICE (AMENDMENT, APPEAL, INJUNCTION, WARDEN); PRIVATE PROPERTY; TRESPASS.

286.—Prohibition—Exemption.]—P. and party sued R. and party for encroachment. The Warden decided in favour of P. and party. R. and party appealed to the Court of Mines, and the decision was upheld. On motion for prohibition to the Court of Mines to restrain execution of decree: *Held*—(1.) That the irregularity

in describing the plaintiffs and defendants in the proceedings as P. "and party" and R. "and party" was not a ground for prohibition. (2.) That a proclamation proclaiming a township reserve in 1854, and signed "John Foster, by His Excellency's command," prior to the date of the Act No. 32, was not an exemption of the land from mining under the 4th sec. of that Act. *Re Rogers, ex parte Robson*, A.R., 30th June, 1859. V.

287.—What parties ought to be before the Court.]—In complaints for encroachment before the Warden, under sec. 72 of the Act No. 32, all the shareholders being holders of miner's rights, and entitled to sue, or such of them as appeared to the Warden or Court sufficiently to represent such shareholders, ought to be before the Court. *Critchley v. Graham*, 2 W. & W. (L.), 71. Banco (1863). V.

288.—Striking out parties.]—Under the Act No. 32, where deceased persons, or persons incapacitated from suing, appear upon the minutes of the Warden's decision as complainants, or as appellants, or respondents in an appeal, the Court of Mines sitting upon such appeal from the Warden's decision could amend the proceedings in the Warden's Court, as also in the appeal by striking out the names of such deceased or incapacitated persons. *Ibid.* V.

289.—Deceased or incapacitated persons.]—The fact of deceased or incapacitated persons being made parties in the complaint before the Warden does not invalidate the proceedings; and it is not the proper course in such a case for the Court of Mines to reverse the Warden's decision, without prejudice to fresh proceedings before the Warden, confined to the proper parties. *Ibid.* V.

290.—Drainage assessment.]—In an appeal by one of the claim-holders assessed to the Court of Mines from a drainage assessment made by a Warden under the Act No. 153: *Held*, that it was not necessary to make the other claim-holders parties to the appeal. *Early v. Barker*, 1 W.W. & A'B. (L.), 32. Banco (1864). V.

291.—Service—Prohibition.]—Under the Act No. 32, sec. 34, the judge of the Court of Mines could hear an appeal from the Warden although all the respondents had not been served, if he was satisfied at the hearing that those served

sufficiently represented all the parties. It is improper for a judge of the Court of Mines to postpone the hearing of a case before him in order to obtain the advice of the Supreme Court by the machinery of prohibition. *Re Rogers, ex parte Shean*, 2 W.W. & A'B. (L.), 84. Banco (1865). V.

**292.—Joint application—Amendment.]**—"O. and the three others (in a proceeding before a Warden to be put in possession) had each distinct claims to one man's portion, and though their individual rights might have been exactly parallel, they could not join as co-plaintiffs, as if they four had a conjoint right in four claims; and I think the Warden was wrong in allowing an amendment, changing the summons by four into a summons by O. only."—*Per Molesworth, J. Oxley v. Little*, 5 W.W. & A'B. (M.), 14 (1868). V.

**293.—Before Warden—Adding a defendant.]**—On the hearing of a summons before a Warden, the Warden added as co-defendant the name of a person then present in Court, but who did not appear as a party, either in person or by his attorney, against his will, and despite his objection he was made a party. No adjournment took place, and an order was made against him. *Held*, that the Warden had no jurisdiction to act as he did, and that the order he pronounced be quashed. Had the case been adjourned to a future day the fact of making him a party and then adjourning might have been considered equivalent to giving him notice to attend on the day of adjournment, and he might perhaps have been treated as if a summons to attend on that day had been served on him. *Reg. v. Sherard, ex parte Fraser*, 5 W.W. & A'B. (L.), 80. Banco (1868). V.

**294. — Suit in Equity — Special injury — Non-joinder.]**—Where one person, a member of a mining partnership, complains of a special injury to himself done by defendants, managers and trustees of the partnership, it does not follow because he is one of several shareholders, and it is possible all the others might have been injured in a like manner, that all should be joined as co-plaintiffs, in a suit in equity against the defendants. *Ogier v. Smith*, N.C., 3; A.R., 3rd and 29th Sept., 1869. Full Court. V.

**295.—By-law as to transfer—Registered company—Trespass—Act No. 32, sec. 77.]—A Sand-**

hurst mining by-law, in pursuance of the authority given by the Act No. 32, sec. 3, provided that no transfer of any claim should be legal unless registered. V. and others were the registered owners of a claim. In June, 1870, they formed themselves into an incorporated company under the Act No. 228, called the Equity Company, Registered. V. and others did not transfer their interests, as the by-law directed, to the incorporated company. A plaint was subsequently brought in the Court of Mines for trespass against O'Rorke, in which V. and the other registered owners and the Equity Company were the plaintiffs. At the hearing an objection was made to the capacity of the company to sue, as not having a proper miner's right, and the name of the company was by consent struck out. It was thereupon contended that the other plaintiffs could not sue, as they had parted with their interest to the registered company. *Held*, that the other plaintiffs being the only duly registered owners, and no transfer having been registered from them to the incorporated company, were entitled to recover. If a person purports to take up any Crown land as a claim under his miner's right, although the ground so taken up may have been previously applied to a public use, any other miner seeking to take advantage of the illegality or defect, must take proper legal proceedings, asking for possession, instead of taking it himself. "The Act No. 32, sec. 77, on which *Critchley v. Graham*, 2 W. & W. (L.), 211, was decided, embraces cases not merely of claims forfeited or deemed to be abandoned, but cases of persons claiming the possession of lands of which any other person has possession, or claims to occupy under the Act."—*Per Molesworth, J. O'Rorke v. Vallancourt*, 1 V.R. (M.), 43; 1 A.J.R., 158 (1870). V.

**296. — Unnecessary defendants — Costs.]—T.** and others brought a suit in the Court of Mines against B. and others to obtain possession of a claim on the ground of forfeiture. At the hearing it appeared that some of B.'s co-defendants had no interest and claimed none in the ground in dispute. *Held*, that it was no objection to the suit that too many defendants were brought before the Court, the plaintiff having merely to pay the costs of those whom he had summoned without reasonable cause. *Thompson v. Begg*, 2 V.R. (M.), 1; 2 A.J.R., 4. *Molesworth, J.* (1871). V.



**297.—Parties—Want of equity.]—**M. and H. were entitled to a claim in equal shares. Afterwards P. and others were improperly registered for the claim, transferring one-third share to H. On 14th December, 1874, M. commenced suit against P., H. and others claiming half, and gave notice at the Registrar's office. This suit was heard 12th February, 1875, and decree made in favour of M. on the 11th of May. On 8th March Hartley obtained order of forfeiture of the claim against P., H. and the others, and got possession. M. then sued Hartley for half the claim. *Held*, that the plaint was defective for want of equity, as there was nothing alleged showing that the claim was not properly liable to forfeiture when Hartley obtained the order, and if the defendant Hartley was liable at all, it was not defective for want of parties. *Morrison v. Hartley*, 1 V.L.R. (M.), 15. *Molesworth, J.* (1875). V.

**298.—Information and bill—Parties—Mining license—Trespass—Licensors.]—**A licensee of land for gold mining purposes cannot bring a suit for trespass to the land by excavating it and taking gold therefrom, and for an account of the gold removed, without making the licensor a party, even though the Attorney-General be joined as plaintiff. *Attorney-General v. Lansell*, 7 V.L.R. (E.), 59; 2 A.L.T., 155. *Molesworth, J.*, affirmed by Full Court, 8 V.L.R. (E.), 155, 173 (1881). V.

**299.—Trespass—Parties.]—**The Attorney-General and freehold owners of land may join in a suit to restrain a trespasser from mining for gold on the land. *Attorney-General v. Lansell*, 8 V.L.R. (E.), 155; 3 A.L.T., 141. F.C., *Stawell, C.J.*, *Higinbotham and Williams, JJ.* (affirming *Molesworth, J.*), (1882). V.

**300.—Parties—Writ—Declaration—Variance—Amendment.]—**Where the writ of summons stated that it was issued in an action at the suit of (naming the plaintiffs), as directors of the Melbourne and Newcastle Minmi Colliery Company and the declaration was in their own right, the declaration was ordered to be amended so as to correspond with the writ. *Thorn v. Berri-man*, 3 N.S.W.S.C.R. (L.), 124. *Stephen, C.J.*, and *Wise, J.* (1864). N.S.W.

**301.—Parties—Application to strike out a defendant—Minister for Justice—Goldfields Act (Q.) 1874 (38 Vic. No. 11), sec. 15—Claims**

**Against Government Act 1866 (29 Vic. No. 23), secs. 2, 7—Forfeiture of lease.]—**A gold mining lease having been granted and rent paid, one O'F. came in and stated that the mine was not worked according to regulations. The question then came on before the Warden, who recommended the lease to be cancelled, which was done by the Government. A lease of the land in question was then made to another company. *Held*, in an action to set aside the forfeiture and to recover possession, that the Minister for Justice was not rightly joined in the action, and an application to strike out his name as a defendant was granted with costs. *Kirkbride v. Minister for Justice and New Day Dawn Freehold G.M. Co. Ltd.*, 3 Q.L.J., 163. *Harding, J.* (1889). Q.

**302.—Action for fouling stream—Joint tortfeasors—Parties.]—**A number of miners in separate parties, without concert between the different parties, sluiced tailings into two streams, the waters of which mingled at a point above the plaintiff's land. The effect was that the tailings came down the streams and injured the plaintiff's land. There was no means of ascertaining to which miner or group of miners any particular injury was due. *Held*, that all the miners were joint wrong-doers, and properly made defendants to one action. *Costello v. O'Donnell*, N.Z.L.R. 1 C.A., 105. C.A., *Prendergast, C.J.*, and *Richmond, J.* (1882). N.Z.

**303.—Parties—Principal and Agent—Sale of shares—Forfeiture—Jus tertii.]—***See COMPANY*, 200.

**304.—Declaration of forfeiture of lease—Suit for trespass by lessee before re-entry by Crown—Attorney-General not necessary party.]—***See LEASE*, 29.

**305.—Uncertificated insolvent—Right to bring action for trespass.]—***See INSOLVENCY*, 1.

**306.—Forfeiture of shares—Amalgamation of companies—Suit by shareholder for rectification of register—Parties.]—***See COMPANY*, 205.

**307.—Lease granted to manager of company—Death of manager before execution of lease—Lease void—Summons for illegal occupation of Crown lands—Parties.]—***See LEASE*, 38.

**308.—Action for forfeiture of shares—Registered owner—Parties.]—***See COMPANY*, 224.



**309.—Partnership—Fraud—Money had and received—Accounts—Joinder of parties—Joint contract.]—See FRAUD.**

#### XLVI.—PAYMENT INTO COURT.

**310.—Distress—Payment of money into Court—Jurisdiction to determine rights of parties where liquidator's appointment invalid.]—See DISTRESS.**

#### XLVII.—PETITION OF RIGHT.

*See COMPANY, 309.*

**311.—Petition of right—Injunction—20 Vic. No. 15—24 Vic. No. 7.]—See PRACTICE, 192.**

#### XLVIII.—PLEADING.

*See COMPANY, 51; RES JUDICATA.*

**312.—Gold mining on private property—Lease—Illegality—Pleading.]—In an action for breach of the covenants of a lease granted by the owner of land for the purpose of mining for gold on such land, a plea that such contract is illegal, as being for the purpose of taking gold which belongs to the Crown, must negative every hypothesis which would render such a contract legal. *Clarke v. Pitcher*, 9 V.L.R. (L.), 128; 5 A.L.T., 17. *Stawell, C.J., Williams and Holroyd, J.J.* (1883). V.**

**313.—Pleading—Contract—Collateral provisions—Consideration—Transfer of gold mine—Fraud—Evidence.]—It is sufficient to state in the declaration so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration. In an action to recover the balance of a sum due on the sale and transfer of a gold mining reef, the defendants pleaded they were induced to enter into the agreement by the false and fraudulent representations of the plaintiffs. *Held*, that the plaintiffs, on the issue of fraud, might state what they had been told as to the mine by any of their co-plaintiffs. It is incumbent on a defendant pleading *fraud* to prove the representations to be false, and that they were made by the plaintiffs, either with a knowledge of their falsehood, or recklessly, without any information on the subject, and with a view to benefit themselves. *O'Brien v. Watson*, 12 N.S.W.S.C.R.**

(L.), at p. 303 *et seq.* *Martin, C.J., Hargrave and Faucett, J.J.* (1874). N.S.W.

**314.—Pleading—Equitable plea to action on promissory note—Breach of agreement to renew—Fraud.]—Declaration on a promissory note made by the defendant company in favour of H. and indorsed by H. to the plaintiff. Plea, on equitable grounds, that the plaintiff was a shareholder in the defendant company, and knew that the defendants could not satisfy the amounts of certain promissory notes current, and among them the note to H. now sued upon. And during the currency of such notes, and in order to put the defendant company in funds and to prevent them from being wound up, the parties to such notes and the plaintiff agreed that the several notes should be renewed at maturity. And afterwards certain of the parties, in whose favour such notes were drawn, in part performance of their agreement, renewed the notes held by them. "And afterwards the said H. and the plaintiff, in fraud of the said agreement, and intending and devising to gain an advantage over the said several other persons who had renewed the said promissory notes so held by them as aforesaid, agreed that the said H. should transfer to the plaintiff, and the said H. did accordingly transfer to the plaintiff by indorsement the said promissory note in the declaration mentioned." *Held*, a good plea. *Williams v. Australian Cobalt and Manganese Co.*, 7 N.S.W.L.R. (L.), 81; 2 W.N., 69. *Martin, C.J., Faucett and Innes, J.J.* (1886). N.S.W.**

**315.—Pleading—Dismissal of mining engineer.]—See CONTRACT, 7.**

**316.—Pleading—Shares—Breach of contract—Tender of scrip.]—See COMPANY, 228.**

**317.—Sale of gold mine—Contract—Memorandum indorsed—Not set out in declaration—Oral contract—Statute of Frauds.]—See CONTRACT, 8.**

**318.—Pleading—Joint defendants severing defences—Set-off by one defendant of debt due to him separately.]—See *Vale of Clwydd Coal Co. v. Garsed*, 2 N.S.W.W.N., 14. *Windeyer, J.* (1885). N.S.W.**

**319.—Pleading—Misrepresentation by directors—No allegation of fraud—No repudiation of shares.]—See COMPANY, 29.**

**320.—Pleading—Plea of fraud—Company—Action for instalments.]—See COMPANY, 238.**

**321.—Pleading—Volenti non fit injuria—Coal mine—Defect in system—Blasting—Negligence—39 Vic. No. 31, sec. 12, sub-sec. 19.]—See EMPLOYER AND EMPLOYEE, 7.**

**321a.—Conversion—Mining tenement—Mining Act 1874, sec. 18.—A declaration for conversion of two allotments of land and houses, &c., thereon, not stating that such lands were mining tenements, held bad. *Lucas v. Meagher*, 13 N.S.W.W.N., 67. *Darley, C.J.*, and *Manning, J.* Banco (1896). N.S.W.**

**321b.—Fraud—Working a forfeiture—Co-owners in mining lease—Trustees.]—A gold mining lease was obtained by the defendants, the D.'s, and plaintiff, which was worked by the D.'s in person and by employed men, plaintiff being responsible for their wages. The property was afterwards registered as exempt from work for a certain time under the condition that the water should be kept below a certain depth, and if it were allowed to rise above that depth the lease was to be forfeited. McD., knowing these circumstances, entered into an agreement with the D.'s, and prevailed upon them to allow the water to so rise, and so allow a ground of forfeiture to accrue, the consideration being that McD. promised to remit a debt which the D.'s owed him, and to erect machinery and lay out moneys on the property, if, upon forfeiture, it should be allotted to him, and that he would divide the property, so that the D.'s would have what they had before increased by the expenditure on the property and the remission of their debt, and he would obtain plaintiff's share. This agreement was carried out, and after forfeiture the land was taken up by McD. and transferred by him to the defendants, K. and M. The plaintiff thereupon brought an action, claiming in a statement of claim setting forth the facts as above a declaration that so much of the property comprised in the new lease as represented the old property should be held by the defendants as trustees for him; that accounts be taken of gold raised, and in alternative damages in respect of the fraud practised. The defendants demurred on the ground that no fiduciary relationship ever subsisted between the plaintiff and McD. in respect of the lease. *Held*, allowing the demurrer, that there was no duty imposed on the**

**D.'s to refrain from committing the forfeiture, and that if they were under a duty—e.g., to look after his share—the plaintiff should have so stated, and that co-owners in mining properties are not partners or co-trustees, the one for the other. *Little v. McDonald*, 1 Q.L.J., 124. *Harding, A.C.J.* (1883). Q.**

#### XLIX.—POLICE MAGISTRATE.

**322.—Police magistrate.]—See BY-LAWS AND REGULATIONS, 20; PRACTICE (JUSTICES).**

#### L.—PRELIMINARY OBJECTION.

**323.—Preliminary objection.]—See PRACTICE, 49, 350.**

#### LI.—PRESCRIPTION.

**324.—Prescription.]—See PRACTICE (LIMITATIONS).**

**325.—Pollution of stream—Defence of prescription.]—See WATER, 41.**

#### LII.—PROCESS.

**326.—Process.]—See PRACTICE (SERVICE).**

**327.—Judge's summons—Process—Seal of Court—Practice—Courts of Mines—Mining Statute 1865 (No. 291), sec. 100—Mining Companies Act 1871 (No. 409), sec. 35.]—A judge's summons, under sec. 35 of the *Mining Companies Act* 1871 (No. 409), need not be under the seal of the Court. The provisions of sec. 100 of the *Mining Statute* 1865 (No. 291), apply only to process. *Murphy v. Cotter and United Hand and Band Co.*, 7 V.L.R. (M.), 16; 3 A.L.T., 17. *Stavell, C.J.* (1881). V.**

#### LIII.—PROHIBITION.

**See PRACTICE (COSTS, PARTIES); TRESPASS.**

**327a.—Prohibition—Miners' rights, holders of—Goldfields Act (18 Vic. No. 37), secs. 10, 11—Assessors—Local Courts—Surveyor of claims, conclusive effect of evidence of.]—Where magistrates have jurisdiction, a decision, though erroneous, will not be interfered with. Construction of *Goldfields Act*, sec. 11, when assessors required. Parties not being allowed to go into alleged defence, not ground for prohibition but for *mandamus* to hear before determining; before granting which Court will see that the**

evidence had bearing upon the case. Evidence of surveyor of claims appointed under Local Court Rules conclusive. *Donaldson v. Cogden*, 1 V.L.T., 49. *a'Beckett, C.J.* (1856). V.

**328.—Prohibition.]—Held**, that a summons for retaining possession of ground, which did not allege that the defendant had been removed by the Warden, disclosed no offence under Act No. 32, sec. 122, and that prohibition against a conviction obtained under it should issue. The section should be read strictly. *Ex parte Barclay, in re Pasco*, 2 W. & W. (L.), 38. Banco (1868). V.

**329.—Act No. 291, secs. 171, 174—Special case—Evidence—Jurisdiction.]—The Supreme Court** will not interfere with the order of the Court of Mines by prohibition when it has not exceeded its jurisdiction, although the order may be bad. If a defendant in the Court of Mines asks for a special case at the close of the evidence for the plaintiff, without stating that he desires to call evidence, he will be bound by the decision on the special case, and will not be allowed afterwards to re-open the case and call further evidence on his behalf. *Semble*, that a special case should not be stated until all the evidence has been taken on both sides. *Reg. v. Cope; Re Moore v. White*, 4 A.J.R., 113. Banco (1873). V.

**330.—Company—Applicant for mineral lease—Compensation—Prohibition.]—The fact that a** company is not competent to become the holder of a mineral lease, though proved in evidence before the Warden, is not a ground for a writ of prohibition to prohibit the Warden from further proceedings in a complaint laid by the company as an applicant for a mineral lease to have the amount of compensation fixed under the *Mines Act* 1890 No. 2 (No. 1202). The fact also that persons jointly interested with the defendant have not been summoned in such proceedings cannot form the subject of prohibition. *Moe Coal M. Co. Ltd. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C., *Madden, C.J., Holroyd and Hodges, JJ.* (1894). V.

**330a.—Rule nisi for prohibition—Effect of appeal pending in District Court.]—A rule nisi** for prohibition was taken out on certain grounds to restrain the respondents from proceeding on a judgment of a Warden's Court. Before the hearing an appeal was brought in the District Court from the same decision. *Held*, on return

of the rule nisi, that the parties should have exhausted such appeal before coming to the Supreme Court, and rule nisi accordingly discharged. *Secretary for Public Instruction v. Auld, Brisbane Courier*, 7th April, 1886. F.C., *Lilley, C.J., Harding and Mein, JJ.* Q.

**331.—Prohibition—Rules of Warden's Court—Summons.]—See PRACTICE, 426.**

**331a.—Warden—Jurisdiction—Relief granted in excess of powers—Prohibition.]—See PRACTICE, 433c.**

#### LIV.—PROSPECTIVE INJURY.

*See PRACTICE (INJUNCTION).*

**332.—Summons for diverting and abstracting water—Prospective injury.]—See WATER, 5.**

#### LV.—PROTECTION ORDER.

**333.—Protection order—Neglect to post certificate.]—The period allowed by a protection order**, protecting a mining claim from forfeiture for non-working, is, in some degree, a judicial act of the Registrar, and the neglect of the claimholder to procure or post the certificate, as required by the by-laws, does not deprive him of the benefit of the protection from forfeiture. *Weddell v. House*, 8 V.L.R. (M.), 44; 4 A.L.T., 95. *Molesworth, J.* (1882). V.

**334.—Protection order—How construed by Courts.]—Per Molesworth, J.:** "Courts are generally rigid as to construing laws imposing forfeitures, and for the same reason should be lax in construing provisions protecting from forfeitures." *Weddell v. House*, 8 V.L.R. (M.), 44, at p. 50; 4 A.L.T., 95 (1882). V.

#### LVI.—QUIA TIMET.

**335.—Quia timet actions—How far principles of apply in proceedings before Warden.]—See PRACTICE, 451.**

#### LVII.—RECOGNISANCE.

**336.—Recognisance.]—See PRACTICE, 57.**

#### LVIII.—RECORD.

**337.—Record—Scire facias—Crown grant.]—See LEASE, 70, 71, 72.**

## LIX.—RE-HEARING.

See COMPANY, 186, 187, 335; PRACTICE (APPEAL, COSTS, WARDEN).

**338.—Re-hearing.]**—Under the Act No. 32, sec. 70, the Court of Mines could only grant one re-hearing of a hearing on an appeal. *Dennis v. Vivian*, 1 W.W. & A'B. (L.), 201. Banco (1864). V.

**339.—Mandamus—Quashing decree—Subsequent proceedings.]**—The Prince of Wales Company sued the Working Miners Company in the Court of Mines, at Ballarat, for an encroachment and for an account of gold taken. On the 27th July, 1868, the Court of Mines made a decree in favour of the plaintiffs, and ordered accounts to be taken. This decree was affirmed with some alterations, on appeal by the Chief Judge of Court of Mines. The decree of the 27th July, 1868, was subsequently quashed by the Supreme Court. On the suit being set down for re-hearing by the plaintiffs, the Judge of the Court of Mines refused to hear it on the ground that the decree of the Chief Judge had not been quashed, and that so long as it remained he could not interfere. *Held*, that when the decree of the 27th July was quashed, all the subsequent proceedings depending on it fell with it; and that as otherwise there would be a failure of justice, the rule *nisi* for a *mandamus* to compel the judge to proceed with the hearing of the cause should be made absolute. *Reg. v. Rogers*, 6 W.W. & A'B. (L.), 138. Banco (1869). V.

**340.—Re-hearing of application for fresh certificate—Partners—Abandonment.]**—See PARTNERSHIP, 29.

## LX.—SCIRE FACIAS.

**341.—Scire facias—To repeal grant—Jurisdiction—Sec. 137 of Crown Lands Act of 1884 retrospective—Corporation cannot make a mineral conditional purchase—"Person."]**—Sec. 137 of *Crown Lands Act* 1884 (48 Vic. No. 18), that every grant "issued under this Act or any Act hereby repealed shall be deemed to be a record of the Supreme Court," is retrospective, and applies to grants issued before the passing of that Act. And therefore *scire facias* will lie to repeal any such grant. A corporation cannot make a valid conditional purchase, under sec. 19 of *Crown Lands Alienation Act* 1861 (25 Vic. No. 1), of land for the purpose of mining. The

word "person" in sec. 13 of that Act does not include a corporation. *Reg. v. Redhead Coal M. Co.*, 7 N.S.W.L.R. (L.), 279; 3 W.N., 59. *Martin, C.J., Faucett and Innes, JJ.* (1886). But see now 50 Vic. No. 21. N.S.W.

**342.—Scire facias—Application to amend writ—Jurisdiction—Costs of application.]**—The Court has jurisdiction to allow a writ of *scire facias*, issued on the fiat of the Attorney-General, to be amended on the application of the plaintiffs by adding new counts. It is not necessary that the Attorney-General should issue a new fiat in respect of such added counts if they raise the same questions substantially as they were intended to be tried. The Court accordingly allowed an application by the plaintiffs to amend the writ, and by a majority (*Faucett, J., diss.*), made the order with costs, but directed the plaintiffs to pay the costs of the amendment. *Reg. v. Macintosh*, Supreme Court, August 3rd, 1850, not followed. *Reg. v. Redhead Coal M. Co.* (No. 2), 7 N.S.W.L.R. (L.), 402; 3 W.N., 60. *Faucett, Windeyer and Innes, JJ.* (1886). N.S.W.

**344.—Scire facias.]**—See LEASE, 70, 71, 72.

**345.—Repealing Crown leases—Scire facias.]**—See LEASE, 70, 71, 72.

## LXI.—SERVICE.

See LEASE; PRACTICE (APPEAL, PARTIES, SUPREME COURT, WARDEN).

**346.]**—Under the Act No. 32, the judge of the Court of Mines could order service of summons by publication of the summons in a newspaper, and a verdict recovered by plaintiff against a defendant so served was upheld. *Casey v. Wilkie*, A.R., 15th Sept., 1865. V.

**347.—Mining Statute 1865, sec. 180—Enlarging summons—Substitution.]**—An application for substitution of service of a Warden's summons ought to be made when the summons is returnable. The Warden may then enlarge the summons, if necessary. Under the *Mining Statute* 1865, sec. 180, he has no power to order substitution of service, before the hearing. *Taylor v. Stubbs*, 6 W.W. & A'B. (M.), 19. *Molesworth, J.* (1869). V.

**348.]**—Substitution of service of a Warden's summons can only be ordered at the hearing. Such an order cannot be made at the time the

summons is issued. *Reg. v. Akhurst*, 6 W.W. & A'B. (L.), 84. Banco (1869). V.

**349.—Warden's summons—Substitution—Hearing.**—A Warden has no power to make an order for substitution of service before the complaint comes on for hearing. *Reg. v. Akhurst*, 6 W.W. & A'B. (L.), 244. Banco (1869). V.

**350.—Of Court of Mines summons—Appearance to object to service—Irregular affidavit—Attorney—Rules.**—An attorney for defendant in a proceeding in a Court of Mines has a right to appear to object to the regularity of the affidavit of service; and such an appearance does not waive the irregularity. Where the affidavit of service of Court of Mines summons upon the defendants was not sealed or stamped under Court of Mines Rule No. 22, and had an interlineation not initialled, contrary to Rule 24; *Held*, that the service was not proved. *Mitten v. Spargo*, 1 V.R. (M.), 22; 1 A.J.R., 70. *Molesworth, J.* (1870). V.

**351.—Act No. 291, sec. 180—Representation—Substitution.**—D. obtained a Warden's summons against B. and eighteen others. B. was the only one not served, and he did not appear on the trial. The Warden made an order against all the defendants. On motion made at B.'s instance, to quash the order on the ground that he had not been served: *Held*, that on the construction of Act No. 291, sec. 180, every person made a defendant in a suit must be served, in some way, and it is for the Warden to exercise his discretion as to what service he will deem sufficient, and he may order substitution of service. "But it appears that the Act contemplates also cases in which a defendant is to be sufficiently represented. The Warden here also is to determine whether such defendant is sufficiently represented in interest to enable him to proceed. That was the opinion of the Court in *Reg. v. Clow, ex parte Oliver*, 5 W.W. & A'B. (L.), 89, when a defendant undertook, on the authority delegated to him, to act for three others. That was held to be sufficient, for the Warden was satisfied that H., having been served, S. appeared for himself and the other defendants, and it was for him, the Warden, to decide whether the defendant who appeared, sufficiently represented all the parties interested. In this instance there has been no service whatever, personal or by substitution, and no representation by a person who acted as attorney for

the absent defendant, or to whom was delegated a power to represent him in interest. The order of the Warden must therefore be set aside. My brother judge (*Williams, J.*), desires to guard against an inference which might arise from the supposition that representation before the Warden, without service, would be sufficient." Order quashed. *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.), 155; 2 A.J.R., 110. Banco (1871). V.

**352.—Act No. 228, sec. 15—Act No. 409, sec. 14—Act No. 345, sec. 122—Act No. 274, sec. 91.**—When after the passing of the Act No. 409, a County Court summons against a company under Act No. 228 was served personally on its manager: *Held*, good service under the joint operation of the *County Court Statute 1869* (No. 345), sec. 112, and the *Common Law Procedure Act 1865* (No. 274), sec. 91. *Porter v. Leviathan Co.*, 2 V.L.R. (L.), 228. Banco (1876). V.

**353.—Act No. 291, sec. 180.**—G. and several others were sued in trespass before a Warden. G. was not served with the summons. The Warden held that service on the other defendants was sufficient, and made an order for damages against all the defendants. No application was made to the Warden to strike G.'s name out of the summons. G. obtained a rule to quash the order on the ground that he had not been served. *Held*, that the order was bad as to G. for non-service, and being bad as to him was bad altogether. *Reg. v. Belcher, ex parte Gilbee*, 4 A.J.R., 80, 110. Banco (1873). V.

**354.—Mining Companies Act 1871 (No. 409), sec. 14—Service of process on company—Registered letter.**—Where a summons to a mining company, registered under the *Mining Companies Act 1871* (No. 409), was delivered to the manager personally at an office other than the registered office of the company in a registered letter addressed to him as at such other office: *Held*, that such service was good. *Reg. v. Lawlor, ex parte Lone Hand Q.M. Co.*, 8 V.L.R. (L.), 207. *Stawell, C.J., Higinbotham and Holroyd, JJ.* (1882). V.

**355.—Service of summons on company out of time.**—Where a summons to appear before justices was served on the manager of a company two days after the day fixed for appearance, but he took no steps to ascertain what course the justices had taken, and the summons

was in fact adjourned, but no notice of such adjournment given to the company : *Held*, that no sufficient reason was shown for quashing the order made by justices at the adjourned hearing. *Reg. v. Lawlor, ex parte Lone Hand Q.M. Co.*, 8 V.L.R. (L.), 207. *Stawell, C.J., Higinbotham and Holroyd, JJ.* (1882). V.

**356.—Service of writ—Company.]—***Held*, good service of a writ where served on manager of mine at Broken Hill, the head office of the company being in Melbourne, in the absence of an affidavit stating that business was not carried on at Broken Hill. *Buck v. Eaglehawk Silver M. Co.*, 6 N.S.W.W.N., 149. *Foster, J.* (1890). N.S.W.

**357.—Service of winding-up petition—Registered office of company.]—**See COMPANY, 356.

**357a. — Service on no liability company (N.S.W.)]**—See NO LIABILITY COMPANY.

## LXII.—SPECIAL CASE.

See COMPANY, 187 ; EVIDENCE ; MINER'S RIGHT ; PRACTICE (APPEAL, INJUNCTION, MINING APPEAL, PROHIBITION, WARDEN) ; ROAD.

**358.—Costs.]—**The Supreme Court would not give costs on a special case reserved under the Act No. 32, sec. 70. *Jenkinson v. Cumming*, 1 W. & W. (L.), 337. *Banco* (1862). Compare *Kin Sing v. Won Pau*, 1 W. & W. (L.), 303 (1862) ; and *Nightingale v. Daly*, 3 W.W. & A'B. (M.), 7, at pp. 9, 10 (1866). V.

**359.—Mode of stating case—Costs.]—**Where a special case from the Court of Mines, after setting out the whole of the evidence for the plaintiffs, concluded by asking whether the plaintiffs had established a case, it was sent back to be re-stated. The points in difference should have been succinctly stated. *Thomas v. Kinnear*, 2 W. & W. (L.), 221. *Banco* (1863). V.

**360.]—**No costs will be given in special cases by the Chief Judge. "Primary judges should, acting upon this view, put parties whom they think wrong to appeal, instead of giving them special cases, unless their opinion is so uncertain that they think this result as to costs fair."—*Per Molesworth, J. Fahey v. Kohinoor Co.*, 3 W.W. & A'B. (M.), 6 (1866). See Act No. 446, secs. 5, 25. V.

**361.—Right to begin—Costs—Appearance.]—**On a special case stated by the Warden for the

opinion of the Chief Judge, the complainant in the Court below should begin. No costs will be given on special cases by the Chief Judge. *Ibid.*, 3 W.W. & A'B. (M.), 4. *Molesworth, J.* (1866). See Act No. 446, secs. 5, 25. V.

**362.]—***Seem*, that the Chief Judge will answer a special case, although there be no appearance for either party. *Anderson v. Coyle*, 3 W.W. & A'B. (M.), 10. *Molesworth, J.* (1866). V.

**363.—Right to begin.]—**On a case stated for the opinion of the Chief Judge by the Court of Mines, on an appeal from the Warden, the appellant has the right to begin. *Stevens v. Webster*, 3 W.W. & A'B. (M.), 23. *Molesworth, J.* (1866). V.

**364.—Mode of stating case.]—**Where a special case from the judge of the Court of Mines, on appeal from Warden, set out the evidence for the appellants at length, and concluded by asking whether upon the evidence the judge of the Court of Mines was right in deciding to dismiss the appeal : *Held*, that such a mode of asking the propriety of a nonsuit, inasmuch as it did not show the supposed defect of the plaintiffs case, was inconvenient. *Longbottom v. White*, 3 W.W. & A'B. (M.), 35. *Molesworth, J.* (1866). V.

**365.—Act No. 291, sec. 171—Act No. 446, sec. 22.]—**Before any question is stated for the opinion of the Chief Judge in the form of a special case the hearing of the case must be completed. *Ex parte Sea Queen Q. Co.*, 5 A.J.R., 77. *Banco* (1874). V.

**366.—Act No. 446, secs. 22, 23—Certiorari.]—**When a judge of a Court of Mines refused to state a special case under Act No. 446, sec. 22, on the ground that the facts before him disclosed no question of law, and decided the suit before the expiration of ten days from such request on rule for *certiorari* to bring up the order : *Held*, that the judge was right, as no question of law had in fact arisen. *Reg. v. Dunne, ex parte Golden Fleece Old Chum Co.*, 4 A.J.R., 123. *Banco* (1873). V.

**367.—Special case—Costs.]—**Costs should be given to the successful party on a special case stated by a Warden. *Allison v. Sharp*, 17 A.L.T., 240 ; 2 A.L.R., 50. *a'Beckett, J.* (1896). *Fancy v. North Hurdfield United Co.*, 8 V.L.R. (M.), 5 ; 3 A.L.T., 89. *Stawell, C.J.* (1882). V.

**368.—Special case—Right to begin.]—**On a special case stated on an appeal to the District Court of Mines from a Warden, the appellant has the right to begin. *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.), 19. *Molesworth, J.* (1882). V.

**369.—Mining Statute Amendment Act 1872 (No. 446), secs. 22, 25—Special case—When should be stated.]—**Where, in a special case from a District Court of Mines, several questions are asked the Chief Judge, one of which is not at the time material and is not answered, such question may be asked again in another special case after a further hearing in the Court below, and where the judge of such Court, under such circumstances, refused to state a case, an order was made absolute to compel him to do so. *Talent v. Dibdin*, 8 V.L.R. (M.), 31; 4 A.L.T., 19. *Molesworth, J.* (1882). V.

**370.—Special case from Warden—Setting down—No appearance—Motion for re-hearing.]—**When a special case stated by a Warden for the opinion of the Chief Judge arrived on the morning of the first day of the sittings of the Chief Judge: *Held*, that it was properly set down for argument during that sittings, and that both parties ought to be prepared to proceed with the case. Where under such circumstances the case was argued in the absence of the complainant, who had not instructed counsel, motion for a re-hearing refused with costs. *Fattorini v. Band and Albion Consols Regd.*, 8 V.L.R. (M.), 41; 4 A.L.T., 94. *Molesworth, J.* (1882). V.

**371.—Special case—Subjects for.]—**Questions depending upon results of conversation between judge and counsel are not proper subjects for special cases. *Weddell v. Howse*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1883). V.

**372.—Special case—Additional affidavits.]—**On the hearing of a special case from a Court of Mines, the Court will not receive affidavits filed after the special case has been stated, but will only deal with the special case as it stands. *Conway v. Louchard*, 10 V.L.R. (M.), 6; 6 A.L.T., 120. *Molesworth, J.* (1884). V.

**373.—Mines Act 1890 (No. 1120), sec. 265—Application to state special case—Meaning of words “upon the hearing.”]—**Upon the hearing of an appeal from a Warden of goldfields before a judge of the Court of Mines the solicitor for

one of the parties, when it became evident that the decision of the judge would be adverse to him, interrupted the judge in the course of his delivery of his judgment, and applied to him to state a special case for the opinion of the Supreme Court. The learned judge refused the application on the ground that it was made too late, and proceeded to make an order allowing the appeal with costs. *Held*, that the application was not made too late, and that the hearing was not over, and a rule for a writ of *certiorari* against the party in whose favour the order was made and the judge of the Court of Mines made absolute. *Reg. v. Thomson, ex parte Costin*, 4 V.L.R. (L.), 512, and *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373, discussed. In *Reg. v. Thompson, ex parte Costin*, the Court decided, as a matter of fact, and not as a matter of law, that the application was made too late. *Hancock v. Vanderstoel*, 17 V.L.R., 671. F.C., *Higinbotham, C.J., Webb and Hood, JJ.* (1891). V.

**373a.—Special case—Goldfields Act 1874, sec. 71.]—**On a special case from a Warden the Court is bound by the terms of the case, but if the evidence taken in the Court below is not sufficiently stated by the Warden the Court may send the case back again for further information. *Brunt v. No. 2 South Louisa G.M. Co., Brisbane Courier*, 15th May, 1885. F.C., *Lilley, C.J., Harding and Mein, JJ.* Q.

**374.—Special case—Signature.]—**Where a special case is remitted for the opinion of the Court by the proper persons it is not necessary that it should be signed. *Turnbull v. Jones*, N.Z.L.R. 3 S.C., 456. *Williams, J.* (1885). N.Z.

**375.—Jurisdiction of Warden to state special case—Up to what time case may be stated.]—***See PRACTICE, 221.*

**376.—Jurisdiction of Warden to state special case—Mines Act 1890 (No. 1120), Part II.]—***See PRACTICE, 226.*

**377.]—Special case from Warden—37 Vic. No. 13, sec. 79—Jurisdiction of Supreme Court.]—***See PRACTICE, 423.*

**378.—Miner's right—Insolvency—Intervention of assignee after Warden's decision—“Re-hearing”—Mining Act 1874, sec. 109—Value of property involved—Jurisdiction.]—***See MINER'S RIGHT, 37.*



**378a.**—Special case stated by District Court judge—Appeal from Warden—Security for costs.]—See PRACTICE, 152b.

**379.**—Case stated by Warden—37 Vic. No. 19, sec. 79—No appearance.]—See PRACTICE, 273.

**379a.**—Special case—District Courts Act 1891 (Q.), sec. 144—Goldfields Act 1874, sec. 74.]—See PRACTICE (DISTRICT COURT).

### LXIII.—SUPREME COURT.

See PRACTICE (APPEAL, COSTS, COURT OF MINES, JURISDICTION).

**380.**—Jurisdiction—Certiorari—Quashing Warden's proceedings.]—The Supreme Court will grant certiorari to bring up proceedings before a Warden, in order to have them quashed for non-service of the summons on a defendant. *Re Clow*, A.R., 3rd April, 1868. V.

**381.**—Court of Mines—Concurrent jurisdiction.]—The Supreme Court is not deprived of any portion of its jurisdiction by the establishment of the Court of Mines. *M'Cafferty v. Cummins*, A.R., 3rd April, 1868. V.

**382.**—Jurisdiction—Court of Mines—Concurrent jurisdiction.]—The jurisdiction of the Supreme Court is not taken away by the *Mining Statute* 1865, and it is not to be taken away unless by express words, or under very extraordinary and exceptional circumstances. *Mulcahy v. Walhalla G.M. Co. Reyd.*, A.R., 20th May, 1868. V.

**382a.**—Action under Employers Liability Act (Q.), (52 Vic. No. 3) — Jurisdiction of Supreme Court.]—Plaintiff was a miner employed by the defendant company. He was ordered to proceed from the 500 feet level to the 428 feet, and to fulfil this order had to be hauled up by a windlass and rope, which were the only means, according to his version, of getting up. The rope broke, and he fell and broke his leg. He brought an action under the *Employers Liability Act*, claiming £500 damages. The defence was that the plaintiff was not ordered to go as stated, and had no right to go to where the accident took place. He was, on the other hand, ordered to go by a ladder, the rope never being used. The rope was a new one, and the plaintiff was negligent. The jury found in favour of the plaintiff, damages £205. Motion was made on behalf of defendant for judgment for defendant on the

grounds that the action should have been brought in the District Court under the *Employers Liability Act*, and also that there was no evidence of negligence. *Held*, that the Supreme Court had jurisdiction, and that there was evidence of negligence to go to the jury. Judgment entered for plaintiff. *Campbell v. No. 1 North Phoenix G.M. Co.*, *Brisbane Courier*, 22nd Nov., 1887. *Harding, J.* Q.

**383.**—Jurisdiction of Supreme Court—Company carrying on operations outside Victoria—Registered office in Victoria—Winding up.]—See PRACTICE, 224.

**384.**—Supreme Court—Jurisdiction—Winding up company—Company registered in colony—Carrying on operations out of colony.]—See PRACTICE, 222.

**385.**—Supreme Court—Scire facias—Power of promulgating rules.]—See LEASE, 70, 71, 72.

### LXIII.A.—VESTING ORDER.

**385a.**—Vesting order—"Stock"—"Shares."]  
—Where an order vests (among other things) "stock" in a trustee, the word "stock" includes "shares" in a joint stock company. In this case the board of directors of the Nymagee Copper Company refused to allow a transfer to be made on the ground that the word "stock" did not include "shares." *Sparke v. Blanton*, 7 N.S.W.L.R. (E.), 39. *Manning, J.* (1886). N.S.W.

### LXIV.—WARDEN.

See ABANDONMENT; BY-LAWS AND REGULATIONS; COMPENSATION; DAMAGES; ESTOPPEL; FORFEITURE; ILLEGAL OCCUPATION; LEASE; LIEN; PARTNERSHIP; PRACTICE (AMENDMENT, APPEAL, COSTS, JURISDICTION, MANDAMUS, PARTIES, PROHIBITION, SERVICE, SUPREME COURT); RESIDENCE AREA; ROAD; TRESPASS; and the work *Passim*.

**386.**—Partnership—Possession of undivided share.]—By the 77th sec. of the Act No. 32 a Warden was empowered to hear and determine a complaint by a partner claiming an undivided share in a claim and to put him in possession thereof. *Kin Sing v. Won Pau*, 1 W. & W. (L.), 303. *Banco* (1862). V.

**387.**—Jurisdiction.]—Under the Act No. 32 a Warden had no power to grant permission to



mine on a public road. *House v. Ah Sue*, 2 W. & W. (L.), 41. Banco (1863). V.

**388.—Carrying out decree of Court of Mines—Mandamus.]**—Where a Warden declined to put parties in possession of a claim under a decree of the Court of Mines (the Act No. 32, sec. 88), on the ground that the decree referred to a map and the description in the decree and map did not agree : *Held*, that a *mandamus* was not the proper remedy, and that the parties should apply to the Court of Mines to correct the error. *Re Cogdon, ex parte M'Dermott*, 2 W. & W. (L.), 139. Banco (1863). V.

**389.—Jurisdiction—Water license — Interference.]**—L. held a license under the Act No. 128, to form reservoirs upon certain land specified in the license. B. constructed a dam seven miles distant from the land comprised in the license, into which water flowed which would otherwise have flowed into L.'s reservoir. L. complained against B. for interfering with his reservoir, under the Acts No. 32, sec. 76, and 25 Vic. No. 148. *Held*, that the Warden had no jurisdiction, and that the judge of the Court of Mines, on appeal from the adverse decision of the Warden, could allow the appeal without leaving any question to the assessors. *Doane v. Fairbairne*, A.R., 11th Sept., 1865. V.

**390.—Notice.]**—Where, under the Act No. 32, a Warden made an order to eject from a claim without notice to the person in possession, and without visiting the ground, a rule for *certiorari* to quash the order was made absolute in the first instance. *Reg. v. Barnard*, A.R., 2nd Dec., 1865. V.

**391. — Order improperly minuted.]**—Where, under the Act No. 32, sec. 80, a Warden's decision was minuted in these words, "Case dismissed, having been adjudicated on before," it was held that the words "having been adjudicated on before" were improperly minuted, and were not part of the decision; and as outside "the decision," were not binding and conclusive on all parties. *Quære*, whether the words "having been adjudicated on before" in the minute were any evidence of the fact? *Sim v. Eddy*, 3 W.W. & A'B. (L.), 21. Banco (1866). V.

**392. — Jurisdiction — Order for inspection — Breach.]**—An order for inspection made under sec. 202 (No. 291), must be either in the form

contained in the 26th Schedule, or must on the face of it show all the matters necessary to give the Warden his statutory jurisdiction. Disobedience to an order made under sec. 202, without a declaration of secrecy, as required by the section, would not be an offence. *Spiers v. Whiteside*, 4 W.W. & A'B. (L.), 91. Banco (1867). V.

**393.—Assessors.]**—A. summoned B. before a Warden and assessors for encroachment. The assessors returned an unintelligible verdict. The Warden then put a special question to the assessors, two of whom answered in the affirmative and two in the negative. The Warden entered up no decisions on these findings, but called other assessors, who found for the complainants. On motion for *mandamus* to compel the Warden to enter the first verdict of the assessors : *Held*, that on the first trial there had been no finding, and that the second finding should stand, but that the Warden was wrong in not giving his casting vote when the assessors were equally divided, and in not entering up the verdict accordingly. *Daly v. Wallace*, 9th April, 1869 (unreported). V.

**394.—Mandamus—Jurisdiction.]**—A. sued B. before a Warden for encroachment. When the case was called on it was stated and admitted that the same case had been heard and determined before. On this statement the Warden dismissed it. It turned out that the same case had not been determined before. On application for *mandamus* to compel the Warden to hear it, *mandamus* refused, as the Warden had already exercised his jurisdiction. *Reg. v. Akehurst*, 7th Dec., 1868 (unreported). V.

**395. — Summons — Order — Jurisdiction — Amendment.]**—G. summoned M. before a Warden, the summons stating that G. sought to have an assignment of one-fifth of a claim from him to M. cancelled and to have an account. M. had advanced G. a sum of money, which had been repaid. The Warden made an order for M. to deliver the share in the claim to G. On motion to quash the order for want of jurisdiction : *Held*, that although the order did not follow the summons the Warden had jurisdiction to make it, and as the summons might have been amended so as to conform to the evidence, it could not be quashed. *Reg. v. Smith, ex parte Mahony*, 3 A.J.R., 48. Banco (1872). V.

**396.—Jurisdiction—Venue—Warden's rules—Prohibition.]**—A summons was issued by the Warden at Donnelly's Creek, to be heard at Donnelly's Creek, in the district of Gippsland, in which K. was complainant against the P.A. Company for wages. The registered office of the P.A. Company was in Ballarat, in the Mining District of Ballarat. On motion before the hearing of the summons for prohibition, on the ground that the venue was wrong according to the General Rules for Wardens, sec. 1, inasmuch as the complaint was not for an interest in land, and should have been brought in Ballarat, where the defendant's company resided: *Held*, that the application was premature, as the objection could be taken before the Warden at the hearing, and the motion was refused. *Reg. v. Foster*, 3 A.J.R., 38. Banco (1872). V.

**397.—Act No. 291, secs. 195, 197, 207—Commitment.]**—If under the Act No. 291, sec. 195, a Warden orders persons to deliver up possession of a claim, or, under sec. 197, orders them to cease from trespassing on a claim, disobedience of such an order can be punished under sec. 207. Disobedience of an order to deliver possession would consist in refusing a demand for possession made by the person entitled to the benefit of the order. The persons disobeying can only be punished after service of summons, stating the offence under sec. 207. *Re Yung Hing*, 4 A.J.R., 57. *Molesworth, J.* (1873). V.

**398.—Amendment — Forfeiture — Amalgamation — Lease — Application.]**—On summons for forfeiture of amalgamated claims, and no amalgamation proved, the Warden can amend summons as seeking forfeiture of any of the claims included in the alleged amalgamation, and adjudicate accordingly. The pendency of an application for a lease should not prevent a Warden from dealing with a summons for forfeiture, and putting the successful complainants into possession. *Jolly v. Stephens*, 5 A.J.R., 169. *Molesworth, J.* (1874). V.

**399.—Decision after special case—Mandamus — Act No. 291, secs. 166, 194.]**—When a case is stated by a Warden for the opinion of the Chief Judge, and such opinion is given, the Warden in entering up his decision in accordance with the opinion, acts judicially and not ministerially, and therefore on refusal so to enter up his

decision, a writ of *mandamus* is the proper remedy. Sec. 166 of the *Mining Statute 1865* classes a Warden with other officers in such a way as to show that it applies only to the enforcement of his ministerial acts. *Reg. v. Strutt, ex parte Laylor*, 3 V.L.R. (L.), 3. Banco (1877). V.

**400.—Dismissal of complaint — Finality — Special case.]**—When a Warden dismisses a complaint, awarding costs to the defendant, the decision is final unless appealed from, and is a bar to another complaint for the same cause of action. The opinion of the Chief Judge on a special case is only decisive so far as it goes. Other points not submitted remain open for adjudication by the original Court. *Semble*, the Warden may act on his own knowledge of the identity of the case. Doubtful how far fresh evidence should be received to show such identity. *Summers v. Cooper*, 5 V.L.R. (M.), 42. *Molesworth, J.* (1879). V.

**401.—Forfeiture—Possession—Mining Statute 1865, sec. 195—Mandamus—Certiorari—Order—Applications for lease—Suspending execution.]**—“It is imperative upon the Warden in all cases under sec. 195, *Mining Statute 1865*, in which he finds the complainant to be entitled as against the defendant, to make an order that the complainant be put into possession, but whether he will allow such order to be executed may depend on the circumstances of the case.”—*Per Fellows, J.* And this notwithstanding that a third party has applied for a lease of the land in dispute (Act No. 446, sec. 3), but the execution of the order may be suspended until the pending rights of third parties are determined. When the Warden finds for the complainant, but omits or refuses to order possession, a *mandamus* cannot issue to compel him to complete his order, but it may be brought up by *certiorari* and quashed, although an appeal from such order to the Court of Mines be then pending. *Reg. v. Orme, ex parte Droscher*, 3 V.L.R. (L.), 343. Banco (1877). V.

**402.—Lease application—Act No. 446, sec. 3—Leasing regulations—Warden's office—Default—Evidence — Notice — Service — Company.]**—On complaint for forfeiture the defence that there is an application for lease pending (Act No. 446, sec. 3), may be met by showing that the applicant has made default by non-observance of regulations, sec. 4. Not serving notice at the

Warden's office would be such default. The Warden's office for the purpose of the regulations is not the place where he sits as judge, but the principal place from which he issues his summonses and orders. Not serving notice on an occupier of the land or any part of it would be such default. When such occupier is a company, service of notice on the manager who takes and retains it would be sufficient service. On hearing a complaint the Warden ought not to act on evidence given before him in another inquiry. *Constable v. Pigtail Co.*, 3 V.L.R. (M.), 7. *Molesworth, J.* (1877). V.

403.—*Mandamus—Hearing case.*]—B. sued the S. Company and others before a Warden for money and a share in a contract. The Warden, considering that he had no jurisdiction as to the S. Company, struck them out, and determined the case in favour of the complainant as against the other defendants. On *mandamus* to compel him to hear the case as against the S. Company: *Held*, that he had exercised his jurisdiction, and determined the complaint. *Reg. v. Gaunt, ex parte Bahlman*, 4 A.J.R., 114. Banco (1873). V.

404.—*Miner's right—Assessment of damages—Possession—Complainants.*]—On complaint by several for trespass and taking possession, the Warden has jurisdiction to assess damages in favour of such of the complainants as hold miners' rights, and to put them in possession of so much of the ground, or such share as their miners' rights would entitle them to occupy or hold, although some of the complainants have no miners' rights. *See Queen Q.M. Co. v. Sea Q.M. Co.*, 4 A.J.R., 174. *Molesworth, J.* (1873). V.

405.—*Mining Statute 1865—Amendment Act (No. 446), sec. 25—Mandamus—Act No. 565, sec. 10.*]—A Warden is bound to give judgment in accordance with the opinion of the Chief Judge, (Act No. 446, sec. 25), and, on refusal, a writ of *mandamus* will be granted by the Supreme Court. Act No. 565, sec. 10, does not apply to Wardens. *Reg. v. Strutt, ex parte Constable*, 3 V.L.R. (L.), 186. Banco (1877). V.

406.—*Act No. 291, sec. 177—Signature to Summons—Act No. 446, sec. 14.*]—A Warden's summons was signed by the Warden's clerk in his own name. The defendants appeared and objected to the service, as not having been effected four days before the day of appearance.

This objection was over-ruled. This case was then heard, the defendants cross-examining the witnesses, and the Warden found for the complainants. On rule for *certiorari* to quash on the ground of defective signature to the summons: *Held*, that the objection would have been a good one if taken at the proper time, but as the defendants had appeared before a Warden and asked judgment in their favour on the merits they had waived any irregularity which might be in the process, and that the Warden had jurisdiction. *Reg. v. Strutt*, 4 A.J.R., 147. Banco (1873). V.

407.—*Possession—Application for lease—Act No. 446, sec. 3—Adjournment.*]—On a complaint to recover land on the ground of illegal possession, where the defence is that the defendant has applied for a lease, although the Warden is of opinion that the complainant should succeed he cannot put him in possession (*Mining Statute Amendment Act* [No. 446], sec. 3), but he may adjourn the summons from time to time, and may grant injunction restraining mining until the lease application is disposed of. *Hutchison v. Erk*, 3 V.L.R. (M.), 3. *Molesworth, J.* (1877). V.

408.—*Warden's summons—Jurisdiction—Amendment—Defect in statement of cause of action—Act No. 291, Schedule XX.—Warden's Rules, 27th December, 1869.*]—A plaint before a Warden stated that the complainants held miners' rights, and claimed to take possession of Crown lands described in the register as No. 446, of which the defendants were in illegal occupation claiming under miners' rights. On special case on preliminary objections: *Held*, that the summonses showed jurisdiction, and that the Warden could and should dismiss the case on the complainants refusing to amend, as the objection to the defendants' title should in some degree be pointed out. The Rules for Proceedings before Wardens, 27th December, 1869, which provide that the parties may be called on to state their cases respectively, does not go to the extent that the complainant may state his case verbally as to those matters that he ought to have alleged in his pleading. *Barton v. Band of Hope and Albion Consols*, 5 V.L.R. (M.), 18. *Molesworth, J.* (1879). V.

409.—*Warden—Jurisdiction of—Mining tenement—Buildings and fixtures—Mining Statute 1865, secs. 5, 101, 177, 195.*]—Where a Warden

of the goldfields dismisses a plaint seeking recovery of possession of a mining tenement, he does not thereby deprive the complainant of his property in the buildings and fixtures attached to the soil. *Summers v. Cooper*, 7 V.L.R. (L.), 443; 3 A.L.T., 61. *Stawell, C.J., Williams and Holroyd, JJ.* (1981). V.

410.—Mining company — Appearance by attorney — Appointment under seal.] — See COMPANY, 167.

411.—Discretion of Warden — Appeal.] — Whether, after an answer is given by the Chief Judge to a case stated by a Warden, the Warden should take fresh evidence or allow an amendment, is a matter of judicial discretion for the Warden; and, *semble*, there is no appeal from the exercise of such discretion. *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.), 19. *Molesworth, J.* (1882). V.

412.—Evidence of Warden—Admissibility.] — The parol evidence of a Warden who held an inquiry on a lease application as to what a witness stated on such inquiry is admissible, although he is bound to transmit in writing the evidence taken before him to the Minister. *Weddell v. Howse*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1893). V.

413.—Regulation of Mines and Mining Machinery Act 1883 (No. 783), secs. 8 (xxix.), 16 — Summons — Vagueness.] — Where a summons before a Warden to recover damages for injuries sustained by the complainant whilst working in the defendant's mine was in the terms:—"For that the complainant on, &c., was employed in and about the mine of the defendant at, &c., and whilst so employed was descending the shaft of the defendant at the said mine, and the complainant fell down the said shaft to a depth of 100 feet and had his leg and ribs broken and suffered, &c., and was permanently injured, and the complainant says that such injuries were occasioned to him by reason or in consequence of the defendant having contravened and neglected to comply with the provisions of the *Regulation of Mines and Mining Machinery Act 1883* (No. 783)." *Held*, that such summons was bad for vagueness in not alleging which provision of the Act had been contravened. The summons was then amended by adding "sec. 8, sub-sec. xxix., by not having substantial platforms at intervals, &c., in the ladder, &c., and sec. 16 in not having

in connection with the shaft of the mine securely fixed platforms at intervals, &c., in the ladder, &c." *Held*, that the summons as amended was not contradictory or vague, it giving the date of the fact, and referring to the sections relied on; and that it showed jurisdiction in the Warden. *Campbell v. Parker's Extended Q.M. Co. Ltd.*, 10 V.L.R. (M.), 1. *Molesworth, J.* (1884). V.

414.—Mining Statute 1865 (No. 291), secs. 36, 101 (III.), 177—Water right license—Jurisdiction of Warden.]—See PRACTICE, 219.

415.—Mining on Private Property Act 1884 (No. 796), secs. 18, 19, 21—Assessing amount of compensation—Jurisdiction of Warden to state special case.]—See PRACTICE, 220.

416.—Up to what time Warden may state special case.]—See PRACTICE, 221.

417.—Drainage of Mines Act 1877 (No. 596), sec. 3 — Past contributions.] — A Warden has power to make an order for past contributions under the *Drainage of Mines Act 1877* (No. 596). *Cornish Q.M. Co. v. North Cornish Q.M. Co.*, 9 A.L.T., 152. *Webb, J.* (1887). V.

418.—Mines Act 1890 (No. 1120), secs. 216, 336 — Jurisdiction of Warden — Mining on private property.]—See PRACTICE, 225.

419.—Mines Act 1890 (No. 1120), Part II.—Mining on private property — Jurisdiction of Warden to state special case.]—See PRACTICE, 226.

420.—Mines Act 1890 (No. 1120)—General Rules for Proceedings before Wardens, Rule I.—"Subject matter in dispute"—"Interest in land"—Jurisdiction of Warden.]—See PRACTICE, 227.

421.—Mines Act 1890 (No. 1120), secs. 15, 19, 135, sub-secs. 1, 3, 12—Jurisdiction of Warden—Land exempt from occupation — Government road—Trespass—Permit by council.]—See PRACTICE, 228.

422.—Mining Act 1874, sec. 129 — Forcibly taking possession—Evidence.]—A rule *nisi* for a prohibition was moved against justices who had fined the applicant under sec. 129 of the *Mining Act 1874* (37 Vic. No. 13) for forcibly taking possession of a claim. The right to the claim had been in dispute between R. and the applicant, and proceedings were instituted by R. in the Warden's Court to determine the ownership. The Warden decided in favour of the applicant.

R. thereupon appealed from this decision to the District Court judge, who reversed the Warden's decision and granted the appeal. In pursuance of that decision the Warden removed the applicant from the claim, and put R. in possession. The applicant afterwards ejected R. and worked the ground. The proceedings in question, before justices, were then taken by R. against the applicant. At the trial the justices refused to receive evidence tendered by the applicant of the written judgment of the Warden or to go into the merits of his decision. *Held*, that the justices were right. The rule was refused. *Ex parte Ward*, *Sydney Morning Herald*, 16th Dec., 1876; N.S.W. Digest, 1862-84, col. 568.

N.S.W.

**423.—Mining Act (37 Vic. No. 13), sec. 79—Special case from Warden's Court—Jurisdiction of Supreme Court.]**—The Supreme Court has no jurisdiction to entertain a special case stated by the Warden under sec. 79 of the *Mining Act* where the Warden has not suspended his judgment, but has made an order in the suit. *Per Martin, C.J.*, at p. 87:—"There might have been an appeal to the District Court from the decision, and then we could have heard the case on appeal from that Court; but that course was not pursued here." *Bowes v. Park*, 3 N.S.W. L.R. (L.), 86. *Martin, C.J.*, and *Innes, J.* (1882).

N.S.W.

**424.—Warden—Suit by infant—Next friend—Mode of appointment—Mining Act 1874, sec. 113.]**—An infant cannot sue in a Warden's Court except by his next friend. Where no provision is made by regulations for the appointment of a next friend such appointment may be made by the Warden's Court. *Lucas v. Bourke*, 3 N.S.W. L.R. (L.), 215. *Faucett and Windeyer, JJ.* (1882).

N.S.W.

**425.—Warden—Jurisdiction—Costs—Mining Act 1874, secs. 74, 75, 113.]**—Where an agent, not a barrister or solicitor, appeared before the Warden on behalf of a company of which he was a shareholder and was awarded a sum as his costs of the day, the Court made absolute a rule for a prohibition, with costs, as against the defendant company. *Surplice v. Broken Hill Junction S.M. Co., ex parte Surplice*, 3 N.S.W. W.N., 137. *Darley, C.J.*, and *Innes, J.* (1887).

N.S.W.

**426.—Warden—Warden's Court—Rules of—**

**Summons—Mining Act 1874, secs. 68, 70, 113—Prohibition.]**—Notwithstanding Rule 1 of the Rules of 1874 regulating the practice of the Warden's Court, a sole defendant may be summoned to appear at a Warden's Court in a district other than that in which he resides. *Per Foster, J.*, at p. 137:—"If this Warden had violated a rule of practice of his own Court it might be a fair ground for a new trial in a proper district, but with this we have nothing to do upon an application for a prohibition." *Ex parte Moor*, 7 N.S.W.W.N., 136. *Innes and Foster, JJ.* (1891).

N.S.W.

**427.—Warden—Mining Act 1874 (37 Vic. No. 13), secs. 19, 63, 69—46 Vic. No. 7, sec. 1—Jurisdiction of Warden's Court—Mineral license.]**—No person has a *locus standi* as a party in the Warden's Court unless he holds a miner's right or mineral license. *Duncan v. Fullerton*, 14 N.S.W.L.R. (L.), 308; 10 W.N., 33. *Windeyer, Innes and Foster, JJ.* (1893).

N.S.W.

**428.—Warden—Jurisdiction of Warden's Court—Mining Act 1874, secs. 19, 63, 69—Mineral license—Miner's right.]**—"The Warden's Court was never intended to be one of general jurisdiction, but a Court with a jurisdiction limited to matters in connection with mining and to disputes arising between miners, and the only persons entitled to have their claims and disputes adjudicated upon in that Court are persons who hold either miner's rights or mineral licenses." *Duncan v. Fullerton*, 14 N.S.W.L.R. (L.), 308; 10 W.N., 33. *Windeyer, Innes and Foster, JJ.* (1893).

N.S.W.

**429.—Warden—Mining Act 1874, sec. 70—Summons—Form of—Particulars—Defective summons—Jurisdiction of Warden.]**—A Warden has no jurisdiction to hear a complaint unless the summons complies with sec. 70 of the *Mining Act* by stating the nature of the complainant's case and showing the substance of the facts constituting the cause of complaint. *Ex parte Long*, 16 N.S.W.L.R. (L.), 120; 11 W.N., 184. *Windeyer and Innes, JJ.* (1895).

N.S.W.

**429a.—Mining Act (37 Vic. No. 13), sec. 70—Service of summons—"Rules for Regulation of Practice in Wardens' Courts" (N.S.W.), 21st July, 1874, Rule 3.]**—A summons under sec. 70 of the *Mining Act* must be served eight days before the return day. Rule 3 of Regulations, 21st July, 1874, which provides that a summons

- must be served eight days before the return day "or such other time as the Warden shall direct," does not give the Warden power to shorten the time prescribed, though he may extend it. *Ex parte Pearson*, 17 N.S.W.L.R. (L.), 245; 13 W.N., 55. *Darley, C.J.*, and *Manning, J.* (1896). N.S.W.

429b.—Mining Act (37 Vic. No. 13), sec. 70—Complaint—Complainant's title.]—In a summons under sec. 70 of the *Mining Act* the complainant must show that he has some title to or interest in the land an injury to which is complained of. *Ex parte Pearson*, 17 N.S.W.L.R. (L.), 245; 13 W.N., 55. *Darley, C.J.*, and *Manning, J.* (1896). N.S.W.

430.—Goldfields Act 1874 (38 Vic. No. 11)—Duties of Warden—Mandamus.]—The duties of a Warden as to receiving, recording and reporting on applications under the *Queensland Goldfields Act* 1874 (38 Vic. No. 11) are simply ministerial, and therefore a writ of *mandamus* will lie to compel the Warden to perform such duties. *Davenport's Case* (unreported, 1867), distinguished. "The decision in that case (Davenport's) turned upon the principle . . . that the Court could not grant a *mandamus* against a person who, as an inferior ministerial officer, obeyed a power which he was unable to resist." —*Per Harding, J.*, at p. 3. *Ex parte Mills*, in re *Mills*, 1 Q.L.J., 1. F.C., *Lilley, C.J.*, *Harding* and *Pring, J.J.* (1881). Q.

430a.—Inspection of liens on leases—Refusal by Warden.]—*Mandamus* granted to compel Warden to allow plaintiff to inspect register of liens on leases, which had been refused plaintiff by Warden. Such register must be open to the public. *Forwood v. Sellheim*, *Brisbane Week*, 9th Sept., 1882. F.C., *Lilley, C.J.*, *Harding* and *Pring, J.J.* Q.

430b.—Refusal of Warden to swear assessors—Judicial Act—Mandamus—Action against Warden.—Goldfields Act 1874, sec. 40.]—Plaintiff brought an action in the Warden's Court for damages caused by the wrongful accumulation of water on land adjoining his. When the matter came on the Warden refused to swear assessors and gave judgment for the defendant. The plaintiff then brought an action against the Warden claiming £1000 damages for his refusal to swear assessors, and a *mandamus* to compel him to do so. It was contended on

plaintiff's behalf that sec. 40 of the *Goldfields Act* 1874 gave a party to a complaint the right to insist upon assessors being appointed. *Held*, that the Warden was wrong in refusing to swear the assessors, and that a rule absolute for *mandamus* should go, but that the Warden in so refusing had acted judicially and not ministerially, and, therefore, the action for damages could not lie. *Inch v. Sellheim*, *Brisbane Week*, 18th Nov., 1882. F.C., *Lilley, C.J.*, *Harding* and *Pring, J.J.* Q.

431.—Goldfields Act 1874 (38 Vic. No. 11)—Jurisdiction of Warden.]—The presumption is that a Warden exercising his official duties in a district has been properly appointed. *Mathers v. Ellery*, 1 Q.L.J., 129. F.C., *Harding, A.C.J.*, and *Pring, J.* (1883). Q.

432.—Goldfields Act 1874 (38 Vic. No. 11)—Jurisdiction of Warden.]—A Warden when located has all the powers of a Warden without the necessity of a Warden's Court being proclaimed in the district. *Mathers v. Ellery*, 1 Q.L.J., 129. F.C., *Harding, A.C.J.*, and *Pring, J.* (1883). Q.

432a.—Warden—Jurisdiction—Action by liquidator for calls—Companies Act 1886, sec. 13.]—A Warden's Court has no jurisdiction to entertain an action by a liquidator of a company for calls. *Quære*, whether the liquidator could enforce his rights by way of motion. *Buller's Case* (unreported), followed. *Elmslie v. Mackay*, *Brisbane Courier*, 6th March, 1890. F.C., *Lilley, C.J.*, and *Mein, J.* Q.

[NOTE.—In *Buller's Case* it was decided that a Warden had no jurisdiction in Civil actions except in respect to matters relating to mining, and that the Supreme Court was the proper tribunal for the settlement of disputes between a company and its members.]

433.—Goldfields Act 1874 (38 Vic. No. 11)—Regulation 54—Duty of Warden in registering claim.]—It is against the duty of a Warden, acting ministerially, to register a claim for a greater area than that allowed by Regulation 54 of the Regulations under the *Goldfields Act* 1874 (Queensland), (38 Vic. No. 11), and, if acting judicially it would also be his duty to refuse to register such claim. *Reg. v. Cribb*, 2 Q.L.J., 157. *Harding* and *Mein, J.J.* (1886). Q.

**433a.—Warden's Court—Jurisdiction—Residence area—Cancellation for not occupying.]—**A Warden's Court has no jurisdiction to cancel a residence area for non-occupation at the suit of a subject. Such cancellation is in the discretion of the Crown, to be exercised by the Warden as a ministerial officer under the authority and control of the Minister for Mines. *Missingham v. Smyth*, 8 Q.L.J. (N.C.), 26. *Noel, D.C.J.*, 4th Dec., 1893. Q.

**433b.—Warden's Court—Jurisdiction—Residence area—Valuation of improvements—Goldfields Act 1874 (38 Vic. No. 11)—Regulæ Generales, No. 32.]—**A Warden, in exercising his discretion in the cancellation of a residence area under Regulation 32 of the Regulations made under the *Goldfields Act 1874*, has no jurisdiction to delegate the valuation of improvements thereon to arbitrators, or to order the finding of any person not being a Warden to be made an order of the Warden's Court. *Smyth v. Missingham*, 8 Q.L.J. (N.C.), 27. F.C., Townsville, *Cooper and Chubb, JJ.*, 22nd June, 1893. Q.

**433c.—Warden—Jurisdiction—Relief granted in excess of powers—Prohibition.]—**Where a Warden has jurisdiction to hear a case, but makes an order granting relief which he has no power to give, prohibition will lie to restrain him from acting on such order. *Reg. v. Cusack*, 8 Q.L.J. (N.C.), 32. F.C., Townsville, *Cooper and Chubb, JJ.* (1891). Q.

**433d.—Tailings area—Cancellation—Non-user—Regulations, 8th September, 1894—May be done by Warden.]—**Cancellation of a tailings area for non-user can only be done at the suit of the Crown, or by the Warden as a ministerial officer. *Missingham v. Smyth*, 8 Q.L.J. (N.C.), 26, followed. *Dodds v. Parsons*, 8 Q.L.J. (N.C.), 39. *Noel, D.C.J.* (1897). Q.

**433e.—Trial before Warden and assessors—Disputed claim—Sufficiency of evidence—Determination of dispute by assessors.]—***See Brunt v. No. 2 South Louisa G.M. Co., Brisbane Courier*, 15th May, 1885. F.C., *Lilley, C.J., Harding and Mein, JJ.* Q.

**433f.—Appeal Rules 1894, Rule 35—(Order LVII., Rule 32)—Time for appeal from District Court sitting as Court of Appeal from Warden.]—**Rule 35 of the Appeal and New Trial Rules 1894 (Order LVII., Rule 32) does not apply to an appeal from a District Court judge sitting to hear appeals

from a Warden. *Whetter v. Hall*, 8 Q.L.J. (N.C.), 49. F.C., *Griffith, C.J., Cooper and Power, JJ.* (1897). Q.

**433g.—Gold Mining Act 1885, secs. 5, 7—Miner's right—Mining license—Power of Warden.]—**Her Majesty, through her Wardens of goldfields, has absolute discretion as to the issue of miners' rights or licenses under the *Gold Mining Act 1885*. *Reg. v. Gee, ex parte Wendt*, 23 S.A.L.R., 164. F.C., *Boucaut and Bunday, JJ.* (1889). S.A.

**434.—Action against Warden—Refusal to issue execution.]—***See PRACTICE, 214.*

**435.—Refusal of Warden to issue execution—Mandamus.]—***See PRACTICE, 269.*

**436.—Warden—Action for damages against—Refusal to issue execution—Judicial act.]—***See PRACTICE, 214.*

**437.—Warden's Court—Assessors' powers.]—**Under the provisions of the *New Zealand Goldfields Act 1866* (30 Vic. No. 32), (as amended by the Act of 1867), assessors had a co-ordinate and concurrent jurisdiction with the Warden to decide questions of law and fact according to justice, without regard to rules of law or practice of Courts of law or equity. *Grace v. Eager*, 2 N.Z.C.A., 228. *Arney, C.J., and Richmond, J.* (1872). N.Z.

**438.—Goldfields Act 1866 (30 Vic. No. 32), sec. 62—Jurisdiction of Warden—Forfeiture—Claim—Excess of ground.]—***See PRACTICE, 232.*

**439.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 68—Statute of Frauds—Power of Warden to enforce contract not complying with.]—***See STATUTE OF FRAUDS.*

**440.—Warden's Court—Application for claim—Appeal.]—**There was no appeal under the *Goldfields Act 1866* (30 Vic. No. 32), to the District Court from an adverse decision of a Warden on an application for a mining claim. *Labe v. Harris*, 1 N.Z.J.R. (N.S.) M.L., 15. N.Z.

[NOTE.—But see now the *New Zealand Mining Act 1891* (54 & 55 Vic. No. 33), sec. 286, *et seq.*]

**441.—Warden's Court—Recovery of penalty—Information or complaint.]—**A proceeding instituted in a Warden's Court for the infliction of a penalty should be commenced by information, and not by complaint. *Barrell v. Clayton*, 1 N.Z.J.R. (N.S.) M.L., 46. N.Z.



**442.—Warden's Court—Appeal to District Court—Amendment of summons.]—**Although a Warden has power to amend defects in a summons, the District Court, as a Court of Appeal, has no power to do so. *Sung You v. Koch*, 1 N.Z.J.R. (N.S.) M.L., 55. N.Z.

**443.—Warden's Court—Appeal—District Court—When constituted—Goldfields Act 1862 (26 Vic. No. 21), sec. 29.]—**By the 29th section of the *Goldfields Act 1862* an appeal is given from the Warden's Court to the District Court, but where there is no such District Court having jurisdiction then the appeal is to be prosecuted in the Supreme Court. A district known as the Otago Goldfields District was defined and proclaimed as a district within which should be held sittings of the District Court under the *District Courts Act 1858*, and a judge was appointed, but no appointment had been publicly notified of any times or places when or at which the sittings would be held. *Held*, that for the purpose of an appeal under the Statute there was no District Court having jurisdiction, as there was none then capable of exercising jurisdiction in the district in which the appeal arose. *Boyce v. Hastings*, C.L.J., 19. N.Z.

**444.—Warden's Court—Jurisdiction—Land exempted from occupation for mining purposes—Existing rights.]—***See PRACTICE*, 236.

**445.—Warden's Court—Jurisdiction—Title to land.]—***See PRACTICE*, 238.

**446.—Warden—Jurisdiction to restrain execution.]—***See PRACTICE*, 156.

**447.—Warden's Court—Appeal to District Court—Notice of appeal.]—**An appeal from the decision of a Warden is sufficiently set out if it complies with the provisions of sec. 250 of the *Mining Act 1886* (New Zealand), (50 Vic. No. 51), and the District Court ought not to refuse to hear it because notice thereof does not comply with Form 13 in the Appendix to that Act in stating the nature of the relief sought. *Ward v. Bernston*, 8 N.Z.L.R., 21. *Williams, J.* (1889). N.Z.

**448.—Warden's Court—Appeal to District Court—Time for hearing of appeal—"Not earlier than twenty days"—Mining Act 1886 (N.Z.), (50 Vic. No. 51), sec. 251.]—**A decision was given in the Warden's Court on 8th March, 1889, and under sec. 251 of the *Mining Act 1886* (50 Vic.

No 51), notice was given of an appeal therefrom on the 28th of the same month. *Held*, that the sitting of the District Court to be held on that day was the proper sitting to hear the appeal, the 28th being "not earlier than twenty days" from the date of such decision. *Ward v. Bernston*, 8 N.Z.L.R., 21. *Williams, J.* (1889). N.Z.

[NOTE.—This decision has been practically over-ruled in *Wellington City Council v. Stains*, 10 N.Z.L.R., 329. C.A., *Prendergast, C.J.*, *Dennington* and *Conolly, JJ.*, affirming *Edwards, J.* (1891).]

**449.—Warden's Court—Appeal to Supreme Court—Re-hearing—Costs—Mining Act 1886 (50 Vic. No. 51), secs. 250, 256—"Supreme Court Code."—***See PRACTICE*, 126.

**450.—Mining Act 1891 (N.Z.), (54 & 55 Vic. No. 33), sec. 286—Appeal from Warden—Enlargement.]—***See PRACTICE*, 89.

**451.—Warden's jurisdiction—Public sludge channel—Unauthorised obstruction—Quia timet actions—Mandatory injunction.]—**The Warden of a goldfield has jurisdiction to protect persons likely to be prejudicially affected by an unauthorised obstruction built across a public sludge channel, and to make a peremptory order for its removal, although the proofs of prospective injury fall short of those required in the Supreme Court in ordinary *quia timet* actions. *Clarke v. Round Hill M. Co.*, 13 N.Z.L.R., 266. *Williams, J.* (1894). N.Z.

**451a.—Warden—Jurisdiction—Mining Act 1891 (54 & 55 Vic. No. 33), sec. 125—Application for special claim—Non-completion of survey within time limited by Act—Extension of time—Second applicant.]—**An application for a special claim was lodged in the Warden's office, together with the fees covering the necessary expenses, and the cost of surveying the ground. A plan of the survey was not lodged in the Warden's office within six months after the date of the application. A few days afterwards, no steps having been taken in the interval by the first applicant, an application for the same ground was made by another person. On the same day, but after the second application was lodged, the first applicant applied for an extension of time for completing the survey. An objection was lodged against the granting of the first application by the second applicant, on the



ground that the Warden had no jurisdiction to grant such extension. The Warden allowed the objection, and refused the first application. *Held*, that the Warden was right in ruling that in such a case he had no power to grant the extension of time applied for, the land having become abandoned, the proper construction of sec. 125 of the *Mining Act* 1891 being that the land is to be deemed abandoned unless the Warden grants an extension of time before the expiration of the six months. *Quere*, whether the Warden might not have had jurisdiction to extend the time if no second applicant had appeared on the scene. *McCormick v. Dean*, 15 N.Z.L.R., 322. *Conolly, J.* (1896). N.Z.

442.—Warden—Effect of order for possession—Marking out—Registration—Title to mining claim—Ballarat Mining By-law III.]—See CLAIM, 11.

443.—Warden—Order for contribution—Drainage of Mines Act 1877, sec. 3.]—See DRAINAGE.

444.—Warden—Claim—Plaint for trespass and damages—Assignment by complainant pending appeal.]—See CLAIM, 13.

445.—Warden—Jurisdiction of—Forfeiture of lease—Mining Statute 1865, secs. 3, 45, 71 (vil.), 101, 177.]—See FORFEITURE, 45.

446.—Warden's jurisdiction to make declaratory order as to non-compliance with covenants in lease.]—See COVENANT, 2.

447.—Appeal from Warden—Compensation.]—See COMPENSATION, 6.

448.—Jurisdiction of Warden to assess compensation for surface damage.]—See COMPENSATION, 8.

449.—Forfeiture of shares in a mining partnership—Jurisdiction of Warden.]—See FORFEITURE, 53.

450.—Warden—Insolvent's miner's right—Rights against stranger—Intervention of assignee after Warden's decision—"Re-hearing"—Value of property involved—Practice—Jurisdiction.]—See MINER'S RIGHT, 37.

451.—Warden—Special case—No appearance.]—See PRACTICE, 273.

452.—Mandamus—Warden *functus officio*—Rule against successor—Costs.]—See PRACTICE, 266a.

452a.—Jurisdiction of Warden (Q.).]—See PRACTICE, 230, 231, 231a.

453.—Warden—Jurisdiction—Sale of residence area—Goldfields Act 1874 (38 Vic. No. 11), secs. 32, 67.]—See PRACTICE (JURISDICTION).

453a.—Warden—Taxation of costs—Goldfields Act 1874 (Q.), sec. 85.]—See PRACTICE (COSTS).

454.—Water right—Exchange license—Priorities—Jurisdiction of Warden.]—See LICENSE, 22.

454a.—Mining Act (37 Vic. No. 13), secs. 78, 106—Schedule XI.—Appeal from Warden—Jurisdiction of District Court—Minute of decision.]—See PRACTICE, 152a.

455.—Jurisdiction of Warden to restrain interference with water-race.]—See WATER, 36.

455a.—Appeal from Warden—Special case stated by District Court judge—Security for costs.]—See PRACTICE, 152b.

#### LXV.—WARRANT.

See COMPANY (WINDING UP); PRACTICE (EXECUTION).

456.—Jurisdiction—Mining Statute 1865, secs. 5, 13, 14, 19, 72, 101, 177—Crown lands—Reservation—Rights of claim-holders—Exempting from occupation.]—(1.) The fact of Crown lands being temporarily reserved does not deprive the Warden of his jurisdiction in cases in which such lands were at the time of being so reserved held under miners' rights. (2.) The Warden has jurisdiction in cases arising between the Government and parties claiming under miners' rights so far as regards suits by claim-holders for trespass against officials; not such suits against the Queen. (3.) The Governor-in-Council cannot apply Crown lands previously held as a claim to public use under the *Mining Statute*, sec. 13, but may under sec. 14 except such lands from further occupation as a claim, and then use them without regard to the rights of the claim-holders. *Wakeham v. Cobham*, 1 A.J.R., 93. *Molesworth, J.* (1870). See MINING ACT 1874 (N.S.W.) V.

## LXVI.—MISCELLANEOUS.

467.—Proceeding by summons or by plaint.—Mining Companies Act 1871 (No. 409), sec. 35.]—Proceedings under sec. 35 of the *Mining Companies Act* 1871, to rectify the register of a mining company, may be initiated by summons, or in any way consistent with substantial justice, and need not be by plaint. *Murphy v. Cotter and United Hand and Band Co.*, 7 V.L.R. (M.), 12; 2 A.L.T., 150. *Molesworth, J.* (1881). V.

468.—Form of summons.]—Where a summons included different causes of action, viz., original defect of title and forfeiture if the title were good: *Held*, no material ground for objection. *Weddell v. Howse*, 9 V.L.R. (M.), 13; 4 A.L.T., 179. *Molesworth, J.* (1883). V.

469.—Adjournment of matter from the master to the judge—Equity Act (44 Vic. No. 18), secs. 66, 69.]—A litigant has the right to have any matter transferred direct from the master to the judge before the master has adjudicated upon the matter. Application to the master to transfer the matter to the judge should be made at the earliest possible opportunity. *In re Monkwearmouth Colliery Co., ex parte Assets Realisation Co.*, 14 N.S.W.L.R. (E.), 293; 10 W.N., 96. *Owen, J.* (1893). N.S.W.

470.—Claims against the Colonial Government Act—Discovery by nominal defendant.]—In a suit in Equity against a nominal defendant appointed under the *Claims Against the Colonial Government Act*, the plaintiff is entitled to an order directing the defendant to file an affidavit of discovery of documents. (This was a case in which the plaintiffs, as holders of a pastoral lease of Crown lands at the Wyalong goldfield, and as the owners of certain freehold lands adjoining, brought a suit to restrain the Minister for Mines as nominal defendant for the Government from continuing in possession of certain dams and reservoirs on the plaintiff's holding, and for other relief). *Ricketson v. Smith*, 16 N.S.W.L.R. (E.), 170; 12 W.N., 14. *Owen, J.* (1895). See CROWN LANDS. N.S.W.

471.—Forfeiture of lease—Procedure to set aside.]—*Semble*, the proper procedure for setting aside the forfeiture of a lease is under the *Claims against Government Act* (Queensland) 1866 (29 Vic. No. 23). *Kirkbride v. Minister for Justice and The New Day Dawn Freehold G.M. Co.*, 3 Q.L.J., 163. *Harding, J.* (1899). Q.

472.—Companies Act 1864—Stay of proceedings.]—The Court will stay proceedings against the shareholders of a company which is being wound up, although such proceedings were instituted to recover a debt which became due prior to the registration of the company. *In re Karkarilla M. Co. Ltd. (Moyle's Case)*, 1 S.A.L.R., 43. *Gwynne, J.* Equity (1867). S.A.

473.—Attorney-General—Surplusage—Equity Act 1866, sec. 29.]—The name of the Attorney-General is surplusage in the title of a suit on his information, and it is sufficient to describe him by his official title. *Attorney-General, ex relatione Mills v. Hughes*, 1 S.A.L.R., 49. *Gwynne, J.* Equity (1867). S.A.

474.—Claim—Plaint for trespass and damages—Assignment by complainant pending appeal.]—See CLAIM, 13.

475.—Trespass—Attorney-General—Mining Statute 1865, sec. 37.]—See TRESPASS, 23.

476.—Discovery—Affidavit of belief—C.L.P. Act 1857, sec. 23—Non-delivery of mining shares—Brokers' duty to clients.]—See *Smith v. Goldring*, 4 N.S.W.W.N., 13. *Faucett, J.* (1887). N.S.W.

477.—Garnishee order—Proceedings ex parte.]—See *Briscoe v. Hawkins Hill Consolidated G.M. Co.*, 2 N.S.W.W.N., 51. *Faucett, J.* (1886). N.S.W.

478.—Judicial direction to trustees—26 Vic. No. 12 (N.S.W.).]—See TRUSTS.

479.—Partnership—Suing joint contributor in mining venture.]—See PARTNERSHIP, 17.

480.—Arbitration (N.S.W.).]—See ARBITRATION, 6.

481.—Employers Liability Act 1886—Notice of injury—Leave to proceed where no notice.]—See EMPLOYER AND EMPLOYEE, 6.

482.—Petition to dissolve no-liability company—Affidavit verifying same—Practice.]—See NO-LIABILITY COMPANY.

483.—Injury to water course—Question for jury.]—See WATER, 14.

## PREFERENTIAL SHARES

See COMPANY (SHARES).

**PRELIMINARY OBJECTION**

See PRACTICE, 49, 350.

**PREROGATIVE**

See LEASE; MINE; PRIVATE PROPERTY.

**PRESCRIPTION**

See PRACTICE, XXXVI, LI.

**PRESUMPTION**

Omission to keep accounts—Covenant in lease to do so—Presumption.]—See LEASE, 80.

**PRINCIPAL AND AGENT**

See COMPANY (SHARES); CONTRACT.

1.—Principal and agent—Contract by agent—Authority—Ratification or adoption—Penalty—Performance—Reasonable terms—"Ostensible authority."—See *Langland's Foundry Co. Ltd. v. Worthington Pumping Engine Co.*, 22 V.L.R., 144; 2 A.L.R., 69, 220. *Williams, Holroyd and Hood, JJ.* (1896). V.

2.—Agreement—Power of attorney to dispose of mine—Authority thereunder—30 and 31 Vic. (English Joint Stock Companies Act 1867), sec. 25.]—*Alliance Contracting Co. v. Russell*, 2 A.L.R., 221, 331 (1898). V.

3.—Pegging out claim—Regulations—Goldfields Act 1866.]—See CLAIM, 27.

4.—Specific performance—Inquiries re blismuth mine—Evidence to vary written agreement—Secret commission—Estoppel.]—See SPECIFIC PERFORMANCE, 2.

5.—Employer and employe—Contract—In-

junction—Winding up—Master and Servants Act 1863, sec. 16.]—See EMPLOYER AND EMPLOYEE, 9.

**PRIOR OCCUPATION**

See TRESPASS.

**PRIORITY**

1.—Mining lease—Application for lease—Priority—Goldfields Act 1874 (38 Vic. No. 11), sec. 14.]—Applications for leases are entitled to priority according to the date at which they are tendered to the Warden. *Mills v. Day Dawn Block G.M. Co.*, 1 Q.L.J., 98. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1882). Q.

2.—Certificate of registration—Number.]—Mere priority in point of number of a certificate of registration issued by a Warden is not a priority in point of right. *Ah Mon v. Bradfield*, 1 N.Z.J.R. (N.S.) M.L., 44. N.Z.

3.—Surrender of land held under gold mining lease—Resulting priority in respect of license to water-race obtained subsequent to grant of lease—Waiver.]—In 1880 A. went into possession of land under a lease obtained under the *New Zealand Mines Act 1877* and remained in possession down to date of action. In January, 1886, he applied to have his holding converted into a special claim. In May, 1887, having surrendered his lease, he obtained a title to this special claim. This title he also surrendered in December, 1892, and obtained a fresh title under sec. 10 of the *Mining Act 1891*. In February, 1886, B. applied for and obtained a license to construct a water-race, and without notice to A. or payment of compensation entered upon A.'s land and constructed his race over it, A. making no objection. In 1894, in course of working his own claim, A. sluiced away part of B.'s race. Held, that A. had waived his right to notice, and that B.'s title was good as against A., and had priority over A.'s title. *Baron v. Greenbank*, 13 N.Z.L.R., 342. *Williams, J.* (1895). N.Z.

4.—Applicant for mining lease—Marking out—Priority.]—See LEASE, 31.

5.—Water right—Exchange license—Priorities—Jurisdiction of Warden.]—See LICENSE, 22.

## PRIVATE PROPERTY

See COMPANY; COMPENSATION; CROWN;  
LEASE; MINER'S RIGHT; NUISANCE.

1.—**Injunction.**]—Plaintiffs were members of an unregistered mining partnership, formed for mining on private property belonging to some of the defendants who were also members of the partnership. Defendants ousted the plaintiffs from the partnership and refused to recognise their rights. Injunction granted to restrain defendants from dividing any portion of the profits of the company without paying plaintiffs their share. *Bugden v. McDowell* (unreported), 7th Oct., 1858. V.

2.]—The gold in land alienated from the Crown still belongs to the Crown, and does not pass to grantee. In a suit in equity for relief respecting gold taken from private property the Attorney-General is a necessary party. *Lane v. Hannah*, A.R., 27th Feb., 1861. V.

3.—**Mining operations stopped without prejudice to the prerogative of the Crown.**]—A Crown grantee died intestate leaving an infant heiress at law. Her uncle leased the land to others for mining purposes. On a bill filed by the niece, the Court granted an injunction to stop mining operations without prejudice to any question as to the prerogative of the Crown over the gold. *Fullerton v. Fullerton*, 1 W. & W. (E.), 224. *Chapman, J.* (1862). V.

4.—**Private property—Mining on—Surface damages—Rights of the Crown—Attorney-General—Injunction.**]—Bill by owner of private property for injunction to restrain other persons from undermining his land and taking gold therefrom, and for an account of the gold already taken. On demurrer: *Held*, that the plaintiff, as mere owner seeking protection and account for gold under his land, fails because the gold is in no way his; and as to removal of ground by a trespasser, that is not a subject of injunction unless real damage to the plaintiff's use of the surface result from it. A general averment of irreparable damage unexplained is not sufficient to support application for injunction. *Millar v. Wildish*, 2 W. & W. (E.), 37. *Molesworth, J.* (1863). V.

5.]—All gold mines belong to the Crown, though the Crown may have granted the lands containing them without reservation. The Con-

stitution Act made no change in the legal rights of the Crown as to owning and enforcing rights to royalties, or in the effect of the language of its grants as to passing them. It merely transferred the management and application of revenues of Crown property to the future, from the former Government of Victoria. *Millar v. Wildish*, 2 W. & W. (E.), 37. *Molesworth, J.* (1863). V.

6.]—Motion on behalf of owners of private land for injunction to restrain other persons from carrying on underground mining operations under it. Injunction granted. *Millar v. Wildish* (*supra*), distinguished. In this case the plaintiffs were legally carrying on extensive underground works on their own ground, and were obstructed by the defendants illegally carrying on similar works in the same place. In *Millar v. Wildish*, (*supra*), the plaintiffs were using their surface only, and were not obstructed in their use of it by defendant's works. *Broadbent v. Marshall*, 2 W. & W. (E.), 115. *Molesworth, J.* (1863). See 21, *infra*. V.

6a.]—Information and bill by the Attorney-General and others against other persons for mining on private property, and taking gold therefrom. On demurrer, the case was distinguished from *Millar v. Wildish* (*supra*). In that case it was decided that with reference to the mere undermining of lands, a bill by a private proprietor of the land for an injunction or for an account of the gold removed would not lie. In the present case the Crown was joined as a co-plaintiff. Taking it most strongly that the company, owners of private land, were not entitled to the gold, they were sustaining a legal injury by the removal of the soil, and there was both an equitable and a legal injury to the Crown by the removal of the gold. Demurrer over-ruled. The Attorney-General of Victoria is the proper person to enforce the rights of the Crown in this colony. *Attorney-General v. Gee*, 2 W. & W. (E.), 122. *Molesworth, J.* (1863). V.

7.—**Order for inspection.**]—Order made for the inspection by plaintiffs of mining works of defendants, alleged by plaintiffs to be an encroachment on their private land. *Attorney-General v. Cant*, 2 W. & W. (E.), 113. *Molesworth, J.* (1863). V.

8.—**Injunction.**]—Motion to dissolve an in-

junction restraining defendants from mining under private property demised to the plaintiffs by the original grantees of the Crown. *Held*, that as the plaintiffs were in lawful occupation of the ground they were entitled to the injunction, as irreparable mischief might otherwise be done to their property; and that whether they had a right to the minerals or not they had a right to hold their land *usque ad inferos* against trespassers. Motion refused. *Lane v. Whittlestone* (unreported), 11th-Sept., 1865. *Williams, J.* V.

9.—Title given by exclusive right to mine.]—L. granted to others the exclusive right to mine and sink shafts on his private property. *Held*, that this was an interest in the land, which gave a title to be registered; and that it was unnecessary to discuss the question whether subsequent assignees of L. had notice of the license to mine, as the holders of the license had priority of registration. Injunction granted to restrain subsequent assignees of L. from carrying on mining operations on the land. *Newington Freehold G.M. Co. Regd. v. Harris*, 3 W.W. & A'B. (E.), 174. *Molesworth, J.* (1866). V.

10.—Rights of lessees.]—S. claimed, as assignee of a lease of land, the surface of which was reserved to the lessor, and sought to restrain the assignees of the reversion, who were undermining this leased land from shafts on adjoining land of their own. *Held*, that it was a case of lessees who had legal rights being encroached upon by adjoining owners from within their own ground, and that it was not to be distinguished from *Miller v. Wildish* (*supra*). Injunction refused. *Star Freehold Co. Regd. v. Inkermann and Durham Junction G.M. Co. Regd.*, 3 W.W. & A'B. (E.), 181. *Molesworth, J.* (1866). V.

11.—Exclusive right to mine—Subsequent purchasers.]—Where plaintiffs had obtained from all parties interested (including the mortgagors) in a parcel of land, private property, an exclusive right to mine: *Held*, that defendants, subsequent purchasers of the equity of redemption, could not make use of their subsequent purchase, to exercise rights on the land, inconsistent with the prior rights derived from the same persons from whom the defendants themselves claimed. Injunction granted. *Star Freehold Co. v. Evans Freehold Co.*, 4 W.W. & A'B. (E.), 8. *Molesworth, J.* (1867). V.

12.—Injunction—Encroachment.]—S., owner of private property, granted to A. the exclusive right to mine on certain land, and to B. the exclusive right to mine on other land adjacent. A. alleged that B. was undermining and extracting gold from A.'s land, and sought injunction restraining B. from so doing, and from extracting gold from auriferous earth already raised by B., and for inspection of B.'s mine to ascertain the extent of the injury. Injunction to restrain B. from mining on A.'s land, granted on the principle of *Broadbent v. Marshall*, 2 W. & W. (E.), 115 (*supra*). As to auriferous earth raised, injunction refused, on the principle of *Millar v. Wildish*, 2 W. & W. (E.), 37 (*supra*). *Astley G.M. Co. Regd. v. Cosmopolitan G.M. Co. Regl.*, 4 W.W. & A'B. (E.), 96; A.R., 29th March, 1867. See 21, *infra*. V.

13.—Solicitor—Practice—Wrong-doer.]—It is too late at the hearing to object that the solicitor of a corporation or any plaintiff has not been properly authorised. The owner of private property is not generally entitled to an injunction to prevent the undermining of his ground by persons seeking gold, as he has no right to the gold. Actual mining on a part of land, coupled with intention to mine the entire, protects the entire, and subsequent mining by one rightfully entitled is protected against a prior wrong-doer. *Ibid.* A.R., 1st Oct., 1867. V.

14.—Registered Company.]—A company formed for the purpose of mining on private property may be registered under the Act No. 228. *Bonshaw M. Co. Regd. v. Prince of Wales M. Co. Regd.*, 5 W.W. & A'B. (E.), 140. *Molesworth, J.* (1868). V.

15.—Attorney-General—Account of gold taken.]—"The Attorney-General has clearly a right to an account of gold raised by mining under private property and to stop further mining for gold under it. The infant plaintiff has a right to an injunction to stop—not according to my views in *Millar v. Wildish*, 2 W. & W. (E.), 37—underground injury, but such injury to the surface of his land as the pleading states, and mining so as to produce that injury. As to the connection between the Crown and the owner of the land, this case is distinguishable from *Attorney-General v. Gee*, 2 W. & W. (E.), 122 (*supra*), in which I held the Attorney-General enforcing the Crown's right to gold on private

property might join as a plaintiff in information and bill with the private owner of the land. The pleading there alleged that the private owners had been mining with the consent of the Attorney-General for their own benefit, and that he joined them in seeking an account of past and prohibition against future mining; and I had to decide that they properly joined for some of the relief. Here the plaintiff alleges no consent of the Attorney-General, or any one connected with the Government, to the past mining, nor any consent to apply the past or future proceeds of gold mining to the plaintiff's benefit. For these reasons I think the demurrer should be allowed."—*Per Molesworth, J. Attorney-General v. Scholes*, 5 W. W. & A'B. (E.), 164 (1868). V.

16. — License to mine — Revocation.] — A. entered into a verbal agreement with B. to allow B. to mine on A.'s land, on condition that B. would give him one-tenth of the gold obtained. Shortly after this arrangement was made A. gave B. notice to quit, and proceeded with other persons to mine the land himself. On motion by B. for injunction to restrain A. from mining: *Held*, that B.'s right was terminable at will, and that he was in the same position as a tenant at will who had been turned out. Motion refused. *Miller v. Cranford*, 5 W.W. & A'B. (E.), 199. *Molesworth, J.* (1868). V.

17.—Attorney-General may permit mining for gold on private property—Rights of the Crown—Liability of workmen and servants—Parties to suit—Injunction against assignee of interest.]—The Attorney-General has a right on behalf of the Crown to institute a suit to prevent private persons from taking gold from private property. He has a right to institute such a suit without waiting till the gold is actually reached. But if he filed a bill to prevent a hole being sunk, he may be answered:—"It is not for gold, but for something else we are sinking," and then the information would be dismissed. An information was filed by the Attorney-General to restrain certain persons, defendants, from mining for gold on certain private property. Some of them by their answer said that they were mere labourers employed by the other defendants. *Held*, by *Molesworth, J.*, under the authority of the *Ballarat v. Bungaree Road Board*, 1 A.J.R., 49 (1870), that this was a disclaimer of all title and that the bill should have been dismissed as against them before the hearing. *The Attorney-General*,

*v. Rogers*, 1 V.R. (E.), 132; 1 A.J.R., 120. *Molesworth, J.* (1870). V.

17a.]—In such an information the Attorney-General as guardian of the gold cannot join other parties with him as co-plaintiffs, complaining of different injuries. *Ibid.* V.

17b.]—When an injunction is granted against one person and his servants, and that person's interest passes to another, the liability to attachment for breach of the injunction does not pass to the other until he is made a party to the bill and a new injunction is issued against him. Although a bill must be dismissed as against a person who is a mere servant (*Ballarat v. Bungaree Road Board*, 1 A.J.R., 49), yet when the plaintiffs cannot discover the real owners and the servants refuse to disclose them, that would be an exceptional ground for an injunction against the servants. *Ibid.*, 1 A.J.R., 149. *Molesworth, J.* (1870). V.

18.—Agreements respecting gold—License to mine not under seal—Specific performance.]—There is no illegality in the owners of private property entering into agreements with miners respecting mining for gold on such property, the parties dealing remaining subject to the Crown right being at any time asserted. A license to mine not under seal would be revocable at law (*Wood v. Leadbitter*, 13 M. & W., 838); but as a clear contract would entitle the licensee to have a specific execution by a grant to the same effect under seal. *Ah Wye v. Locke*, 3 A.J.R., 84. *Molencorth, J.* (1872). V.

19.—Attorney-General—Parties—Injunction—Inspection—No-liability companies.]—Information by the Attorney-General on the relation of certain persons, owners of land at Sandhurst, to restrain the defendant company from taking gold from the land in question. Application for an interlocutory injunction against removing the gold and for an order to inspect the defendant company's works. The company was a no-liability company under the *Mining Companies Act* 1871. "Had it been an ordinary company I should have considered the case, but considering the peculiar character of the company, and that it is not responsible for anything, I must prevent them doing further mischief. I shall therefore grant an injunction. I must not be taken as expressing an opinion that when another class of companies was concerned, if the Attorney-

General interfered not really to enforce the rights of the Crown, but really to protect one private person against another, I should grant an injunction. I refuse the inspection order, as no demand was made by a person entitled to inspect as on behalf of the Crown."—*Per Molenworth, J. Attorney-General v. Hustlers Consols Co.*, 3 A.J.R., 70 (1872). V.

20.—Parties to suits for encroachment—Attorney-General—Right to gold.]—Landlords and their tenants may join in a suit for injury to the soil of their land occasioned by strangers mining thereon, and the Attorney-General, representing the Crown as to the gold abstracted, may join in the suit for an injunction and account of the value of gold taken, the same act (the defendant's mining) being a common injury to all. The Attorney-General has a right to recover gold taken from private property, no matter by whom, but he has no right legally to sanction the taking of gold from private property. The gold belongs to the Crown. *Attorney-General v. Boyd*, 3 A.J.R., 18. *Molenworth, J.* (1872). V.

21.—Crown — Royal mines — Trespassers.]—The Crown is entitled to all gold and silver mines against the owners of private property, and its rights can be conveyed away only by express conveyance of royal mines. A grant of all mines would not include them. Persons mining with the consent of the owner on private property are entitled to protection as against trespassers. *Broadbent v. Marshall (supra)*, and *Ausley U.G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W. W. & A'B. (E.), 96, affirmed. *Woolley v. Ironstone Hill Lead G.M. Co.*, 1 V.L.R. (E.), 237. *Molenworth, J.* (1875). Affirmed by J.C., *infra*. V.

22.—Grant of waste lands in Victoria—Rights of the Crown in gold and silver found under the soil.]—A grant of waste lands in Victoria under the Imperial Statute 5 & 6 Vic. c. 36, and made before the passing of the Imperial Statute 18 & 19 Vic. c. 55, does not transfer to the grantee the gold and silver that may be found under the lands so granted. *Woolley v. Attorney-General of Victoria*, 2 App. Cas., 163; 46 L.J. P.C., 18; 36 L.T., 121; 25 W.R., 352. J.C., *Lord Blackburn, Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier* (1877). V.

23.—Mines Act 1890 (No. 1120), secs. 216, 336 — Jurisdiction of Warden — Mining on private property.]—The Warden has jurisdiction to deal with leases for mining on private land. *Hawthorne v. Henderson*, 15 A.L.T., 83. *Hood, J.* (1893). V.

24.—Application to mine on private property—Notice to owner—Error in notice.]—*Semble*, the applicant for a lease to mine on private property is not responsible for errors in the notice sent by the Warden to the owner. *In re Smith*, 21 V.L.R., 80; 17 A.L.T., 78; 1 A.L.R., 64 (*sub nom.*, *In re MacDermott*). *Madden, C.J.* (1895). V.

25.—Mining on private property—Exemption from rates.]—*See MUNICIPALITIES*, 7.

26.—Gold mining on private property—Lease—Illegality—Pleading.]—*See LEASE*, 33.

27.—Mining on private property—Lease from owner of land—Lease from Crown — Right of owner under original lease — Trespass.]—*See LEASE*, 43.

28.—Warden sitting to take evidence on application to mine on private property—Jurisdiction to state special case.]—*See PRACTICE*, 226.

29.—Private lands—Gold in — Ownership — Prerogative—Effect of goldfields legislation—Miner's right.]—*See CROWN*, 3, 4.

30.—Mining on private land—Royal prerogative—Effect of New Zealand mining legislation on prerogative.]—*See Aitken v. Swindley*, 15 N.Z.L.R., 517. *Conolly J.* (1897). N.Z.

## PROBATE DUTY

*See COMPANY*, 235.

## PROCESS

*See PRACTICE*.

## PROCLAIMED GOLDFIELD

*See GOLDFIELD*.

## PROCLAMATION

Limiting Chinese aliens' right to mine—Gold-fields Act 1861.]—*See* ALIEN.

## PROCLAMATION OF GOLDFIELD

*See* GOLDFIELD, 1 ; LEASE, 48 ; MINING ACT 1874, 3.

## PROFITS OF SHARES

*See* COMPANY (SHARES).

## PROHIBITION

*See* PRACTICE.

## PROMISSORY NOTE

*See* BILL OF EXCHANGE.

## PROMOTER

*See* COMPANY.

## PROOF OF DEBT

*See* COMPANY (WINDING UP).

## PROPERTY

1.—Gold attaching to amalgam plates—Quartz-crushing machine—Custom.]—*See* GOLD, 4.

2.—Nature of mining property under Mining Acts—Chattel interests.]—*See* CONTRACT, 9.

3.—Severance of washdirt from soil.]—*See* TAIL-RACE.

4.—Stacked tailings.]—*See* TAILINGS.

5.—Property—Debentures secured upon—Company—Form of—Trust deed giving priorities over subsequent encumbrances.]—*See* COMPANY, 404.

6.—“Property”—Meaning of—Deed of settlement—Unpaid calls.]—*See* COMPANY, 30, 31, 32, 33.

## PROSPECT CLAIM

*See* CLAIM.

Protection claim—Conflicting interests—Saving of “existing rights”—Ballarat By-laws and Regulations, 1856-1858.]—*See* Bedford v. Quick, A.R., 23rd June, 1859 ; 2nd July, 1859. *Stawell, C.J.* V.

## PROSPECTIVE INJURY

*See* PRACTICE, LIV.

## PROSPECTUS

*See* COMPANY.

## PROTECTION CLAIM

Protection claim—Saving of existing rights.]—*See* Bedford v. Quick, A.R., 23rd June, 1859 ; 2nd July, 1859. *Stawell, C.J.* V.

## PROTECTION ORDER

*See* PRACTICE.

## PROXY

Partnership agreement — Forfeiture of partner's share—Voting—Form of proxy—Meaning of “proxy.”]—*See* PARTNERSHIP, 23.



**PUBLIC TRUSTEE**

**Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 112 — Public Trustee — Miner's right.]**—The Public Trustee need not be the holder of a miner's right as prescribed by sec. 112 of the *Goldfields Act 1866* (30 Vic. No. 32), in order to entitle him to sue under that Act. *Woodward (Public Trustee) v. Earle*, 2 N.Z.J.R., 12. *Richmond, J.* (1874). N.Z.

**PUBLICATION**

**Publication of notice of forfeiture.]**—The publication in the *Government Gazette* of a notice of forfeiture, dates from the time of the *Gazette* being fully printed, and not from the time it is accessible to the general public. *Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147. *Molesworth, J.* (1882). V.

**PUBLIC MAP**

See MAP.

**QUALIFICATION**

**Allowance for scientific witnesses qualifying themselves—Taxation of costs.]**—See PRACTICE, 114.

**QUARTZ**

See GOLD.

**Quartz—Agreement to consign, to London—Partnership.]**—See PARTNERSHIP, 18.

**QUARTZ CLAIM**

See CLAIM.

**QUARTZ PROSPECTING CLAIM**

See CLAIM.

**QUIA TIMET**

See PRACTICE.

**QUORUM**

See COMPANY.

**RACE**

See LICENSE; MINER'S RIGHT; TAIL-RACE; WATER.

**RAILWAYS**

**Railways—22 Vic. No. 19, sec. 45—Resumption of land—Basis of valuation.]**—Where land is resumed for railway purposes under 22 Vic. No. 19, the value of such land and the underlying minerals must, on the proper construction of sec. 45, be estimated as if the railway for which such land is resumed had never been contemplated. *Black v. Commissioners for Railways*, 11 N.S.W. L.R. (L.), 160. *Darley, C.J., Innes and Stephen, JJ.* (1890). N.S.W.

**RATES AND RATING**

See MUNICIPALITIES.

**RECOGNISANCE**

See PRACTICE.

**RECONSTRUCTION**

**Companies Act 1874, secs. 57, 212—Shares registered—Contract.]**—See COMPANY, 237.

**RECORD**

See PRACTICE.

## RECTIFICATION

See COMPANY.

## REDEMPTION

Redemption of forfeited shares—Alteration of register.]—See COMPANY, 286.

## RE-ENTRY

See FORFEITURE ; LEASE.

## REGISTER

Rectification of share register.]—See COMPANY, 265.

## REGISTERED HOLDER

Manager of mining company — Registered holder of mining claim—Power to deal with it.]—See COMPANY, 93.

## REGISTERED OFFICE

Service of petition for winding up at registered office of company.]—See COMPANY, 356.

## REGISTRAR

See EVIDENCE.

1.—Assistant Registrar—Mining notices—Independent power.] — The Mining Registrar, according to certain by-laws, possessed the power of granting protective registration on certain conditions. The Assistant Registrar had the same power as the Registrar. A mining company obtained a protection registration from an Assistant Registrar, who signed a notice of protective registration with the name of the Registrar "per D.C." (the name of the Assistant Registrar). *Held*, that the notice was bad.

"The Assistant Registrars are given the powers of Registrars, and should sign by their own names as assistants, not really doing a business themselves and then signing the name of the Registrar."—*Per Molesworth, J. Thompson v. Begg*, 2 A.J.R., 34 (1871). V.

2.—Registrar—Mining—Registration of quartz claim by—How far conclusive.]—See *MINKER'S RIGHT*, 39.

## REGISTRATION

See BY-LAWS AND REGULATIONS ; CLAIM ; COMPANY ; FORFEITURE ; RESIDENCE AREA.

1.—Registration of claim—Penalty for non-registration.]—"Oxley and others worked continuously from the 9th and registered on the 14th. I do not think that the omission to register in two days, under No. 4 of the By-laws (Beechworth), avoided the taking possession by parts, &c. Coupling the *Mining Statute* 1865, secs. 5, 6, 7 and 71 (XIII.), with the language of the by-law, I think the omission would only deprive Oxley and his partner of the powers of secs. 6 and 7 until registration, and subject them to a pecuniary penalty under sec. 237."—*Per Molesworth, J. Oxley v. Little*, 5 W.W. & A'B. (M.), 14 (1868). V.

2.—Name of company.]—It is not necessary for a certificate of registration of a claim to contain the name of a company, being only a partnership, in addition to the names of the members (Act No. 291, sec. 6). *Cruise v. Crowley*, 5 W.W. & A'B. (M.), 27. *Molesworth, J.* (1868). V.

3.—Delay in registration—Ballarat By-laws, 11th May, 1868, III.]—A delay in final registration under By-law III., Ballarat, 11th May, 1868, does not itself defeat title, but only enables prior registration by others to defeat it. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 9 V.L.R. (E.), 37 ; 4 A.L.T., 137, 164. *Molesworth, J.* (affirmed by F.C.), (1883). V.

4.—Amalgamated quartz claim — Application to re-register.]—A verbal application to re-register an amalgamated claim, made by the manager of a company, with the consent of others interested, is valid. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21 ; 5 A.L.T., 54. *Molesworth, J.* (1883). V.

5. — Re-registration of amalgamated claim — Prior titles.]—Where an amalgamated claim has been re-registered under Ballarat By-law No. XI. [see *Government Gazette*, 31st Oct., 1873, p. 1900] the previous separate titles to the claims amalgamated cannot be relied upon. *Parade Co. v. Victoria United Co.*, 3 V.L.R. (E.), 24, questioned. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54. *Molesworth, J.* (1883). V.

6. — Residence area — Registration — Second taking up, and registration before cancellation of first—Right to occupation—Residence Areas Act 1881 (No. 709), sec. 7—Mining Statute 1865 (No. 291), sec. 5.]—Where one person is registered as the holder of a "residence area," no other person can at any time become registered in respect of the same "residence area" without first instituting proceedings to have the prior registration cancelled. *Reid v. Gunn*, 13 V.L.R., 723. F.C., *Williams, Holroyd and a'Beckett, JJ.* (1887). V.

7. — Transfer of claim — Registration — Administrator.]—Goldfields Regulations provided that a claim on the death of its holders should be "protected" for the benefit of his personal representatives. *Held*, that letters of administration need not be registered as a transfer under the regulations. *Woodward v. Earle*, 2 N.Z. J.R., 12. *Richmond, J.* (1874). N.Z.

8. — Certificate of registration — Priority.]—Mere priority in point of number of a certificate of registration issued by a Warden is not a priority in point of right. *Ah Mon v. Bradfield*, 1 N.Z.J.R. (N.S.) M.L., 44. N.Z.

9.—No liability company—Effect of certificate of registration.]—See COMPANY, 122, 123, 124. *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4; 4 A.L.T., 135. *Molesworth, J.* (1883). *Britannia United Co. v. Victoria United Co.*, 16 V.L.R., 533; 12 A.L.T., 46. *Hodges, J.* (1890). *Thomas v. Nicholson*, 16 V.L.R., 861. F.C. (1890). But see next case. V.

10.—Mining Companies Act 1871 (Vic.), (No. 409), sec. 118 (1)—No-liability company—Incorporation—Certificate — Non-payment of capital up to five per cent. before registration.]—The certificate of the Registrar-General of the incorporation of a no-liability company under the Victorian Act No. 409, is conclusive proof that five per cent. of the capital was paid up before

registration as required by sec. 118, sub-sec. 1 of that Act. Decision of *Molesworth, J.*, in *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4, dissented from. *Peel's Case*, L.R. 2 Ch., 674; and *Oakes v. Turquand*, L.R. 2 H.L., 325, at p. 354, approved of. *In re National Debentures, &c., Corporation* (1891), 2 Ch., 505, distinguished. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289. *Owen, J.* (1895). N.S.W.

11.—Registration—Claim—Warden's order for possession — Title to mining claim — Ballarat Mining By-laws.]—See CLAIM, 11.

12. — Amalgamated claims — Registration — Trespass.]—See CLAIM, 14.

13. — Ineffectual registration of residence area.]—See RESIDENCE AREA, 13.

14.—Quartz prospecting area—Gold mining regulations—Forfeiture—Effect of registration.]—See CLAIM, 28.

15.—Registration of claim—Duty of Warden.]—See CLAIM, 32.

16.—Failure to renew certificate of registration—Forfeiture.]—See CLAIM, 35.

## REGULATION OF MINES STATUTE

See EMPLOYER AND EMPLOYE; MACHINERY;  
NEGLIGENCE; PLATFORMS.

## REGULATIONS

See BY-LAWS AND REGULATIONS; LEASE.

## RE-HEARING

See PRACTICE.

## RELINQUISHMENT

See BY-LAWS AND REGULATIONS.

## REMEDY

Breach of statutory contract—Injunction or compensation.]—See *STATUTE*, 4. *Scottish, &c., Co. v. Redhead, &c., Co.*, 13 N.S.W.L.R. (E.), 32 (1892). N.S.W.

## RENEWAL

Failure to renew certificate of registration—Forfeiture.]—See *CLAIM*, 35.

## RENT

Receipt of rent — Continuing forfeiture — Waiver.]—See *FORFEITURE*, 46.

## REPEAL

See *EXISTING INTERESTS*.

## REPRESENTATION

See *PRACTICE (SERVICE)*.

## RES JUDICATA

1.—*Mines Act 1896 (No. 1120), sec. 265*—Plea of *res judicata*.]—A defendant desiring to avail himself of the defence of *res judicata* must prove that the matter in issue on the second occasion was determined on the hearing of the first case. In the Warden's Court such a plea cannot be disposed of until the complainant has called evidence. *Sawtell v. Gay*, 20 V.L.R., 559; 16 A.L.T., 48. *Holroyd, J.* (1894). V.

2.—Plea of *res judicata* by person not party to previous decision.]—Though ordinarily the defence of *res judicata* applies only between the same parties, yet it may be good if raised by a person who claims through one of the defendants. *Sawtell v. Gay*, 20 V.L.R., 559; 16 A.L.T., 48. *Holroyd, J.* (1894). V.

## RESERVATIONS

See *CROWN; LEASE; MINING ACT 1874 (N.S.W.); PRACTICE (WARRANT); WATER*.

1.—Crown grant of freehold reserving precious metals—Rights of freeholder.]—A Crown grantee of land, with an exception and reservation in the grant of all gold and auriferous earth and stone, cannot restrain a stranger from removing gold and auriferous earth and stone from the land, although such stranger may be a trespasser against the Crown. *Garibaldi M. and C. Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233; 6 A.L.T., 93. F.C., *Higinbotham, Williams and Holroyd, J.J.* (1884). V.

2.—Road or street—Property in soil of—Presumption of grant *ad medium filum viae*—Crown grant of freehold reserving precious metals—Rights of freeholder.]—A., deriving title from a Crown grant of a freehold abutting on a street, sought an injunction to restrain B. from mining for gold under the half of that street adjoining A.'s land. The grant to A. expressly excepted and reserved all gold and auriferous stone and earth, and the actual workings of B. were shown to have been confined to such. Injunction refused, as A. showed no title to the auriferous stone and earth. *Per Higinbotham and Williams, J.J.*:—Property in the soil, *ad medium filum viae*, of a public road or street in Victoria, is not created by virtue merely of a grant by the Crown of land defined as being bounded by a distinctly marked road, and *Davis v. Reg.*, 6 W.W. & A'B. (E.), 106, over-ruled, *Holroyd, J.*, expressing an opinion that that case was wrongly decided, but holding that upon the facts the injunction should be refused. *Garibaldi M. and C. Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233; 6 A.L.T., 93. F.C. (1884). V.

3.—Crown grant—Reservation of minerals—Royal mine.]—A deed of grant from the Crown reserving all mines of coal and other public rights, without mentioning Royal mines, must be presumed to have reserved Royal mines. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). Q.

4.—Crown grant—Reservation of minerals—Trespass—Injunction.]—The reservation of mines in a Crown grant is equivalent to the reservation of the stratum of sub-soil containing the minerals,

and an injunction will not lie at the suit of the owner of private property to restrain trespassers from removing soil from such a stratum. *Millar v. Wildish*, 2 W. & W. (E.), 37, followed. *Plant v. Attorney-General*, 5 Q.L.J., 57. *Harding, J.* (1893). Q.

## RESERVE

See CLAIM; CROWN LAND; LEASE; TRESPASS.

1.]—A temporary reservation of Crown land for public purposes under 5 & 6 Vic. c. 36, sec. 3, was held to have been sufficiently announced by a letter from an officer of the Crown Lands Department to the council applying for the ground, intimating that the Governor had approved of permissive occupancy for the purposes named. *United Sir William Don G.M. Co. Regd. v. Kohinoor G.M. Co. Ltd.*, 3 W.W. & A'B. (M.), 74. *Molesworth, J.* (1866). V.

2.—Reserve—Proclamation of—Mining Act 1874, sec. 26—Business license—Holders prior to Act—Renewal.]—See MINING ACT 1874, 4.

## RESIDENCE

1. — Residence of holder of miner's right — Mining Statute 1865 (No. 291), sec. 4.] — Having regard to sec. 4 of the *Mining Statute* 1865 (No. 291), miners' rights setting out the holders' residences as "of Melbourne," are valid and sufficient. *Anthony v. Dillon*, 15 V.L.R., 240; 10 A.L.T., 231. *Hodges, J.* (1889). V.

2. — Unauthorised occupation for residence under miner's right — Penalty.] — See MINER'S RIGHT, 33.

## RESIDENCE AREA

See CLAIM; COMPANY; CROWN LANDS; LIEN; TRESPASS.

1.]—*Semble*, that the holder of a residence area has no right to mine on it. *Warrior G.M. Co. Regd. v. Cotter*, 3 W.W. & A'B. (M.), 96. *Molesworth, J.* (1867). V.

2. — Miner's right — Registration.] — C., the complainant before the Warden, took possession of a residence site under his miner's right, in pursuance of *Beechworth By-laws*, 21st March, 1868, No. 38, by causing posts to be erected, and by having it duly registered, as the by-law required. M., the defendant, had erected posts prior to C., but had failed to register the residence site within the time required by the by-law. The complainant sought an order putting him in possession of the site, which was also claimed by M. C. was the owner of mining interests, though not in the vicinity of the residence site, and said he was going to erect a residence and a store on the site, but he had no business license. *Held*, that the complainant was entitled under his miner's right to the land in dispute. *Campbell v. M'Intyre*, N.C., 12; A.R., 3rd Sept., 1869. *Molesworth, J.* V.

3.—Jurisdiction of Warden—By-law.]—By-law No. 35, of the Gippeland Mining District, 15th June, 1869, provides "that no person shall occupy a residence or business site, any portion of which is within 33 feet of the centre of any road, street, or thoroughfare, or within 10 feet of any site previously occupied." Rice took up a residence site, the whole of which was within 30 feet of a road, and much of it within 10 feet of a residence site occupied by Rosales. Rosales summoned Rice before the Warden, to have him removed from the land, alleging that he was in illegal occupation thereof, and seeking £5 damages, by way of compensation, for injury done to Rosales' site by Rice's occupation of a site between Rosales and the road. *Held*, that the Warden had no jurisdiction either under sec. 101, sub-secs. 1 and 3, or sec. 177 of the *Mining Statute* 1865, his jurisdiction on such matters being limited to cases in which the parties are litigating for the right to the same land, or for actual trespass or encroachment upon, or injury to the land. *Rosales v. Rice*, 1 V.R. (M.), 1; 1 A.J.R., 13. *Molesworth, J.* (1870). V.

4.—Right to mine—By-laws.]—The holder of a residence area has no right to mine upon it himself, nor can he give others the right to mine upon or under it. *Semble*, that by-laws might be made regulating mining upon or under such areas. *St. George and Band of Hope Co. v. Band and Albion Consols Co.*, 2 A.J.R., 83. *Molesworth, J.* (1871). V.

5.—Act No. 291, sec. 5—Miner's right—Landlord and tenant—Estoppel.]—The holder of a miner's right holding a residence area under Act No. 291, sec. 5, although he may assign or encumber it according to by-laws, cannot let it to a tenant, and if he does so let it he cannot receive any rent agreed upon, as such a contract would be a fraud on the public revenue. The tenant in such a case is not estopped from taking the objection to his landlord's title if proceedings are taken by the landlord to recover the rent. *Jones v. Joyce*, 3 A.J.R., 105. Banco (1872). V.

6.—By-laws—Miner's right.]—The holder of a residence area can sublet subject to by-laws. Where the landlord during the tenancy had no miner's right in force, and the tenant got registered as owner: *Held*, that the landlord could not recover possession, although he had a miner's right at the time of the letting and the time of the commencement of the proceedings. *Summers v. Cooper*, 5 V.L.R. (M.), 22. *Molesworth, J.* (1879). V.

7.—Married woman—Act No. 291, secs. 5, 19, 72—By-laws.]—A married woman may hold a residence area in her own right. She may assign or sublet such residence area and hold it by a tenant subject to by-laws (Act No. 291, secs. 5, 19). The by-law requiring residence is complied with by the residence of the tenant. By-laws are not in force until approved and gazetted, and the approval is not retrospective (Act No. 291, sec. 72). *Reardon v. Norton*, 5 V.L.R. (M.), 12. *Molesworth, J.* (1879). V.

8.—Mining lease—Trespass—Mining Statute 1865 (No. 291), secs. 5, 24.]—The Crown cannot grant a mining lease conferring on the lessee a right to mine under a residence area acquired prior to the granting of the lease. *Jones v. Christenson*, 7 V.L.R. (M.), 6; 2 A.L.T., 149. *Molesworth, J.* (1881). V.

9.—Transfer to company—Marking out—Constructive abandonment—Adjudication.]—Where one person is in actual occupation of a residence area under a claim of right no other person can acquire title to the same land by marking it out without first instituting proceedings to dispossess the occupant. *Quære*, whether the title to a residence area is determined by being transferred to a trustee for a company. *Fancy v.*

*Billing*, 7 V.L.R. (M.), 13; 3 A.L.T., 17. *Stawell, C.J.* (1881). V.

10.—Mining Statute 1865 (No. 291), sec. 5—Residence area—Right to remove buildings after termination of right to possession.]—The right given by sec. 5 of the *Mining Statute 1865* (No. 291), to remove from a residence area buildings and fixtures thereon belonging to the holder, must be exercised during his tenure, or within a reasonable time after his right to possession has ceased, and before another person has lawfully entered into possession. *Summers v. Cooper*, 8 V.L.R. (L.), 274; 4 A.L.T., 57. *Stawell, C.J.*, *Higinbotham and Holroyd, JJ.* (1882). V.

11.—Registration—Second taking up, and registration before cancellation of first—Right of occupation—Residence Areas Act 1881 (No. 709), sec. 7—Mining Statute 1865 (No. 291), sec. 5.]—Where one person is registered as the holder of a "residence area," no other person can at any time become registered in respect of the same "residence area" without first instituting proceedings to have the prior registration cancelled. *Reid v. Gunn*, 13 V.L.R., 723. F.C., *Williams, Holroyd and a'Beckett, JJ.* (1887). V.

12.—Marking out residence area pending application for lease—Trespass.]—The marking out of a residence area pending the application for a lease of the same land, is not illegal and useless except as against the applicant for the lease if the lease be ultimately granted. *Gorman v. McLellan*, 14 V.L.R., 674; 10 A.L.T., 51. *Holroyd, J.* (1888). V.

13.—Mines Act 1890 (No. 1120), secs. 28, 41—Residence area—Registration—Transfer.]—Where a party is shown to have pegged out a small plot as a residence area but to have obtained registration of a much larger area without having pegged out the additional area, such registration is bad, as being in contravention of the by-laws of the Ballarat mining district. A transfer by such party, even though registered, is likewise bad. *Galsworthy v. Collins*, 14 A.L.T., 174. *Williams, J.* (1892). V.

14.—Mines Act 1890 (No. 1120), secs. 5, 28, 29, 33—Residence area.]—Though the holder of a miner's right is entitled to a residence area not exceeding one acre in extent, a person is not entitled to take out one residence area in respect

of land under one acre and then to take out other residence areas for adjoining lands until the extent of such land reaches to one acre. *Thomas v. O'Donnell*, 19 V.L.R., 401. *Hood, J.* (1893). V.

15.—*Mines Act 1890* (No. 1120), secs. 5, 28, 29, 33 — *Residence area — Adjoining allotments — Habitable dwelling.*]—The defendant was the holder of a miner's right, and applied for and obtained a residence area in respect of an allotment, No. 280, which allotment was a quarter of an acre in extent. In September, 1892, the defendant transferred her right to allotment No. 280 by way of mortgage, and in January, 1893, applied for and obtained a residence area for the adjoining allotment, No. 281, which was also about a quarter of an acre in extent. There was no habitable dwelling erected on allotment No. 281 within the meaning of sec. 33 of the *Mines Act 1890* (No. 1120), but there was such a dwelling on the adjoining allotment, No. 280. In an application to cancel the registration of the residence area for allotment No. 281 on the ground that no habitable dwelling had been erected thereon within the prescribed period: *Held*, that such registration should be cancelled. *Thomas v. O'Donnell*, 19 V.L.R., 401. *Hood, J.* (1893). V.

16.—*Mines Act 1890* (No. 1120), secs. 5, 29 — *Residence area.*]—*Per Hood, J.*:—"It seems plain that once a miner has taken up one residence area he shall not have another within ten miles of the first one, no matter though the two combined do not exceed one acre in extent, and his residence must be placed upon his land and not upon another piece adjacent." *Thomas v. O'Donnell*, 19 V.L.R., 401, at p. 403 (1893). V.

17. — *Miner's right — Residence area — Sub-letting—Abandonment—Mining Act, sec. 15 (1).*]—The holder of a miner's right having a residence area sub-let it and did not sleep on it, though she occupied it during the day. *Held*, that she had abandoned it. *Teelow v. Ross*, 11 N.S.W. W.N., 94. *Windeyer, J.* (1894). N.S.W.

18.—*Can the holder of a miner's right sub-let a residence area?*]—*See Teelow v. Ross*, 11 N.S.W. W.N., 94. *Windeyer, J.* (1894). N.S.W.

19.—*Occupation by servant or agent.*]—*Actual personal occupation by the owner of a residence*

*area is not necessary; he may occupy by his servant or agent. Kennedy v. Neill*, 1 Q.L.J., 65. F.C., *Lilley, C.J., Harding and Pring, JJ.* (1882). Q.

20.—*Agreement for use of road over residence area—License not easement.*]—*See LICENSE*, 5.

21.—*Residence area—Sale of—Warden—Jurisdiction—Goldfields Act 1874* (38 Vic. No. 11), secs. 32, 67.]—*See PRACTICE*, 231a.

22.—*Residence area—Cancellation for not occupying — Warden — Jurisdiction.*]—*See PRACTICE*, 433a.

23.—*Valuation of improvements — Warden — Jurisdiction—Goldfields Act 1874* (38 Vic. No. 11), *Regulae Generales*, No. 32.]—*See PRACTICE*, 433b.

## RESOLUTION

*See COMPANY.*

## RETAINER

*See ATTORNEY; COMPANY (SEAL).*

## RETROSPECTIVE LAWS

*See BY-LAWS AND REGULATIONS.*

## REVERTER

*Crown Lands Alienation Act 1861, sec. 18—Mineral conditional purchase—Declaration of forfeiture by Crown necessary.*]—*See CROWN LANDS*, 10.

## REVIVOR

*See CLAIM.*

## REWARD CLAIM

*Measurement of distance—Goldfields Act 1874* (38 Vic. No. 11), *Regulations* 6, 9, 44.]—*See CLAIM*, 29.

## RIGHT TO BEGIN

Special case—Right to begin.]—See PRACTICE, 368.

## RIPARIAN RIGHTS

See WATER.

## RIVER BANK

Right of road.]—See ROAD.

## RIVER CLAIM

Definition of banks by Warden.]—See CLAIM, 42.

## ROAD

See CLAIM; LEASE; MINER'S RIGHT; MUNICIPALITIES; RESERVATIONS; TRESPASS.

1.—Dedication—Mining upon road.]—A Crown grant referring to a road and accompanied with user is evidence of dedication of the road. *House v. Ah Sue*, 2 W. & W. (L.), 41. Banco (1863). V.

2.]—The holder of a miner's right is not entitled to mine on a public road without the permission of the proper authority. *Ibid.* V.

3.—Thoroughfare—Permission—User.]—The owner of a claim finding it necessary to cut a tail race through a track outside his claim, altered the track so that it passed through his claim. The track so shifted was used by the public for upwards of two years. The claim owner afterwards dug up the track as part of his claim. The claim owner was proceeded against for obstructing a thoroughfare. *Held*, that he was not liable for obstructing a "thoroughfare" within the meaning of the Act No. 225, sec. 14, that the permissive user did not constitute a dedication to the public for all time, and that the land under the track might be resumed. *Johnson v. Ralph*, A.R., 27th March, 1865. V.

4.—Application to public purposes.]—"As far as I have considered the subject, I would say

that as to a road the *Gazette* advertisement is necessary as an application to public purposes (within the meaning of the Act No. 32, sec. 4)."

—Per *Molesworth, J. United Sir William Don G.M. Co. Regd. v. Kohinoor G.M. Co. Ltd.*, 3 W.W. & A'B (M.), 77 (1866). V.

### 5.—Question of title—Jurisdiction of justices.]

—D., town inspector of Sandhurst, complained before justices against the K. company for sinking a shaft in M. street without authority. It was proved that M. was a proclaimed street, and the justices found as a fact that the shaft was sunk on the street. The K. company produced a lease from the Crown, granting to them land including M. street, but the schedule to the lease reserved, *inter alia*, all streets. The defendants were fined. *Held*, on appeal, that it was for the justices to decide as a matter of fact whether the land sunk upon was a street, and that no question of title was involved. Appeal dismissed. *Kohinoor Co. v. Drought*, 3 A.J.R., 48. Banco (1872). V.

### 6.—Act No. 291, sec. 16 — Permits—Title.]—

An order giving permission to mine under streets by virtue of Act No. 291, sec. 16, does not merely remove obstruction to acquiring title, but confers privileges unconnected with any other title, and is good except as against the real owner. *Extended Hustler's Co. v. Moore's Hustler's Co.*, 5 A.J.R., 117. *Molesworth, J.* (1874). See *Sims v. Demamiel*, *infra*. V.

7.—Claim—Warden—Special case.]—A public road, street, or highway, cannot be taken up as a claim under by-laws, and, if taken up as a claim, cannot be declared forfeited on complaint before Warden by holder of a miner's right, on the ground of non-compliance with by-laws. When, on such a complaint, the Warden dismissed it, and complainant appealed, and the Court of Mines dismissed the appeal, the Chief Judge refused to order the judge to state a special case. *Schonfeldt v. Beel*, 1 V.L.R. (M.), 1. *Molesworth, J.* (1875). V.

### 8.—Ownership—Permit—Act No. 291, sec. 16

—Act No. 506, sec. 370—Trespass.]—An owner of land adjoining a public street or road, is owner *ad medium filum viae*, and may maintain trespass against any person mining on his half. *Semble*, that a permit to mine on a road or street under Act No. 291, sec. 16, is hardly to be relied upon as conferring title.—Per *Fellows, J.* The



*Local Government Act 1874* (No. 506), sec. 370, as to property in roads, commented upon. *Carvalho v. Black Hill South Extended Q.M. Co.*, 1 V.L.R. (L.), 225. *Banco* (1875). See 10, *infra*. V.

9.—**Highway—Subsidence—Inspection.**—When persons are mining underneath public streets, and subsidence takes place, the corporation in charge of such streets may obtain an order for inspection. *Mayor of Ballarat East v. Victorian U. M. Co.*, 4 V.L.R. (E.), 18. *Molesworth, J.* (1878). V.

10.—**Road or street—Property in soil of—Presumption of grant ad medium filum viæ—Crown grant of freehold reserving precious metals—Rights of freeholder.**—A., deriving title from a Crown grant of a freehold abutting on a street, sought an injunction to restrain B. from mining for gold under the half of that street adjoining A.'s land. The grant to A. expressly excepted and reserved all gold and auriferous stone and earth, and the actual workings of B. were shown to have been confined to such. Injunction refused, as A. showed no title to the auriferous stone and earth. *Per Higinbotham and Williams, JJ.* :—Property in the soil, "*ad medium filum viæ*," of a public road or street in Victoria, is not created by virtue merely of a grant by the Crown of land defined as being bounded by a distinctly marked road, and *Davis v. The Queen*, 6 W.W. & A.B. (E.), 106, over-ruled; *Holroyd, J.*, expressing an opinion that that case was wrongly decided, but holding that upon the facts the injunction should be refused. *Garibaldi M. and C. Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233; 6 A.L.T., 93. F.C., *Higinbotham, Williams and Holroyd, JJ.* (1884). V.

11.—**Mines Act 1890** (No. 1120), secs. 15, 19—**Miner's right—Permit by council—Public road.**—It is the miner's right and not the permit of the local council which gives the title to mine under a public road. *Sims v. Demamiel*, 21 V.L.R., 634; 17 A.L.T., 129, 241; 2 A.L.R., 51. F.C., *Holroyd, a'Beckett and Hood, JJ.* (reversing *Madden, C.J.*), (1895-6). V.

12.—*Per Holroyd, J.* :—**Extended Hustler's Freehold Co. v. Moore's Hustler's Freehold Co.**, 5 A.J.R., 116, was over-ruled by *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.), 214. *Sims v. Demamiel*, 21 V.L.R., 634; 17 A.L.T., 129, 241; 2 A.L.R., 51. F.C. (1896). V.

13.—**River bank—Right of road.**—Regulation 18 of the Nelson Goldfields Regulations, that "in all cases a public roadway . . . will be reserved along the banks of rivers," does not make the bank of a river a road, nor does it limit the powers of the Crown or the Superintendent in granting leases including the river bank. It is at most directory, and is declaratory only of the principles on which the Superintendent will act in granting leases. A mere water-course is not a river within the meaning of such a provision. *Costello v. O'Donnell*, N.Z.L.R. 1 C.A., 105. C.A., *Prendergast, C.J.*, and *Richmond, J.* (1882). N.Z.

14.—**Mining Statute 1865** (No. 291), secs. 16, 37—**Leasing Regulations**, 27th January, 1871, clause 4 (d)—**Mining claim under public street—Permit to mine—Application for mining lease—Notice—Person in occupation.**—See CLAIM, 25.

15.—**Agreement for use of road over residence area—License not easement.**—See LICENSE, 5.

16.—**Mines Act 1890** (No. 1120), secs. 15, 19, 135, sub-secs. 1, 3, 12—**Jurisdiction of Warden—Trespass to public road.**—See PRACTICE, 228.

## ROYAL MINE

See CROWN; LEASE; MINE.

1.—**British North America Act 1867**, sec. 109—**Rights of the Province to the precious metals—Conveyance of "public lands"—Construction.**—*Held*, that a conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon and under such lands are not incidents of the land, but belong to the Crown, and under sec. 109 of the *British North America Act 1867*, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied. *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas., 295, at pp. 304-5. J.C., *Halsbury, L.C.*, *Lords Watson, Fitzgerald, Hobhouse and Macnaghten* (1888-9). See also *Reg. v. Earl of Northumberland (Case of Mines)*, 1 Plowd., 310, 336; and *Woolley v. Attorney-General of Victoria*, 2 App. Cas., 163; *Attorney-General of Ontario v. Mercer*, 8 App. Cas., 767.

2.—Goldfields Act 1874 (Q.), secs. 2, 10, 14—  
Mining lease—Trespass—Crown lands.]—*See*  
LEASE, 66, 67, 68, 69.

## ROYALTY

*See* GOLD ; LEASE ; PRIVATE PROPERTY.

## SAFETY APPLIANCE

Safety appliance for cage—Want of—Liability  
of manager—Respondent superior.]—*See* MA-  
CHINERY, 2.

## SALE

- 1.—Sale of shares.]—*See* COMPANY (SHARES).
- 2.—Mine—No-liability company—Directors—  
Ultra vires.]—*See* COMPANY, 131, 301 ; ULTRA  
VIRES.

## SCIENTIFIC WITNESS

Allowances for scientific witnesses qualifying  
themselves—Taxation of costs.]—*See* PRACTICE,  
114.

## SCIRE FACIAS

*See* PRACTICE ; LEASE.

## SEAL

*See* PRACTICE ; COMPANY.

Seal of company—Presumption of due execu-  
tion of instrument.]—*See* COMPANY, 168.

## SECRETARY

Company—Masters and Servants' Act—Injunc-  
tion—Winding up.]—*See* EMPLOYER AND EM-  
PLOYE, 9.

## SECURITY

1.—Security for costs—Action by liquidator of  
no liability company.]—*See* COMPANY, 117.

2.—Security—Keeping alive—Rights of mort-  
gagee.]—*See* MORTGAGE, 11.

## SEQUESTRATION

*See* PRACTICE ; COMPANY.

## SERVICE

*See* PRACTICE ; LEASE.

## SET-OFF

*See* COMPANY, 302.

## SETTLEMENT

Settlement—Deed of.]—*See* COMPANY, 30-33,  
366 ; PARTNERSHIP.

## SHAFT

1.—Regulation of Mines Statute (No. 583), sec.  
6, sub-sec. 10—Mine—Signalling in shaft.]—*See*  
MINE, 4.

2.—Safety appliance for cage in shaft—Want  
of—Liability of manager—Respondent superior.]  
—*See* MACHINERY, 2.

## SHARE

1.—Mining claim—Transfer by infant of share  
in.]—*See* MINING ACT 1874, 1.

2.—Mining claim—Mining Act 1874 (N.S.W.),  
secs. 14, 18, 79—Regulations of December, 1875,  
Nos. 105, 106, 124—Married woman.]—*See* HUS-  
BAND AND WIFE, 2.

**SHAREHOLDER***See COMPANY.***SHARES***See COMPANY.***SHERIFF***See PRACTICE (EXECUTION).***Transfer of shares by sheriff—Registration.]***—See COMPANY, 258.***SIGNALLING****Mine—Signalling in shaft.]—See MINE, 4.****SIGNATURE***See COMPANY ; REGISTRAR ; PRACTICE.***Signature to special case.]—See PRACTICE,****374.****SLUDGE****1.—Sludge—Damage by—Flowing water—Riparian rights—Mining Act 1874 (N.S.W.), sec. 15.]—See WATER, 8.****2.—Action for allowing sludge to flow over land—Verdict demonstrably wrong—New trial.]—See PRACTICE, 275.****SLUICING CLAIM****Extended sluicing claim—Abandonment.]—***See ABANDONMENT, 2.***SOLICITOR***See ATTORNEY.***1.—Privy Council appeal—Authority—Costs.]***—Plaintiffs' solicitor declared to have no**authority to bring Equity suit, and ordered to pay costs. Motion in name of plaintiffs for leave to appeal to Privy Council refused. Hawkins Hill G.M. Co. v. Briscoe, 4 N.S.W.W.N., 132. Banco (1838). N.S.W.***2.—Champerty—Moral claim not sufficient to support a champertous agreement—Defendant not entitled to object that plaintiff is being maintained in suit—Costs.]—**B. took a lease from O. of the mines and seams of coal lying and being in and under a certain parcel of land in consideration of paying to O. a royalty on all coal raised. It was subsequently discovered that a large portion of the coal under this land had been removed by a trespasser previously to the lease. B. then made an agreement with O. that the latter should employ B.'s solicitor, and take proceedings against the trespasser, and B. would indemnify O. for any costs incurred in the proceedings in consideration of receiving 92 per cent. of the damages O. should recover. *Held*, that the agreement was champertous, but that as O. had a real cause of action apart from such agreement, it was no answer to the proceedings instituted by O. against the trespasser. *Collins v. Hayes*, 6 W.W. & A'B. (M.), 5, approved. O. succeeded in his suit against the trespasser. *Held*, that the making of the champertous agreement was a bar to a decree for costs in O.'s favour. *Hilton v. Woods*, L.R. 4 Eq., 432, followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242; 6 B.C., 63. *Owen, J.* (1896). N.S.W.**3.—Retainer—Companies Act (N.S.W.), sec. 68 (3).]—See COMPANY, 83.****4.—Unauthorised proceedings in company's name—Costs—Practice.]—See COMPANY, 405.****SMELTING****Contract for delivery of ore for purposes of smelting—Breach of contract—Measure of damages—Profits of smelter.]—See CONTRACT, 5.****SPECIAL CASE***See PRACTICE, LXII.*

### SPECIAL CLAIM

1.—**Rent—When payable.**—*Quære*, whether by virtue of the New Zealand *Mining Act* 1886 (50 Vic. No. 51), and Regulations the rent of a special claim is payable in advance. *In re Talisman Dredging Co.*, 11 N.Z.L.R., 69. *Williams, J.* (1892). N.Z.

2.—**Right to distress.**—*Quære*, whether the grant of a special claim or licensed holding operates as a demise so as to give a common law right of distress. *In re Talisman Dredging Co.*, 11 N.Z.L.R., 69. *Williams, J.* (1892). N.Z.

### SPECIFIC PERFORMANCE

1.—**Contract for sale of severed chattels—Contract involving continuous acts—Injunction—Damages.**—Although the Court will not decree specific performance of a contract for the sale of severed chattels, still where such contract is an integral part of another contract, and the nature of that other contract would be entirely altered if the chattels in question had to be purchased in the market, the Court will decree specific performance of the whole; but the Court will in no case decree specific performance of contracts which involve the performance of continuous acts. Where the plaintiff prayed for specific performance of an agreement and for an injunction to restrain defendants from proceeding with an action founded on a breach of such agreement, the Court granted the injunction, although the agreement was not one of which specific performance could be decreed. The power of the Court to award damages is confined to the cases enumerated in sec. 32 of the *Equity Act* and to cases where the plaintiff is forced to come into Equity for relief, the measure of which is damages. *Fell v. N.S.W. Oil and Shale Co.*, 10 N.S.W.L.R. (E.), 255; 6 W.N., 51. *Owen, J.* (1889). N.S.W.

2.—**Admissibility of evidence to vary written agreement—Secret commission—Estoppel.**—The defendants requested K., the plaintiff, to make inquiries for and obtain information about a bismuth mine, and promised him as remuneration for such services a share in the property in the event of their buying it. The plaintiff upon making inquiries heard of a

bismuth mine which had been placed in the hands of one C., an agent, for sale, and introduced the property to the defendants; a memorandum of agreement was then made by K. and C., of the one part, and the defendants of the other part, whereby it was agreed that in consideration of K. and C. introducing the property, the defendants would give C. £1,000 cash, and to K. a one-tenth share in the mine and any adjoining property they might acquire, in the event of a purchase being effected. In the memorandum K. and C. were described as agents for the vendors. In a suit for specific performance brought by K.: *Held*, that though the consideration mentioned in the memorandum was a past one, evidence was admissible to show that it was executed by K. upon the previous request of the defendants. *Held*, also, that K. was not estopped from denying that the description of himself in the memorandum as agent for the vendors was true, and that evidence was admissible to show that there was no such agency. *Held*, also, that the fact of C.'s taking a secret commission from the purchasers in fraud of his principals, the vendors, did not taint the agreement with fraud so as to bar K.'s right to specific performance of so much of the agreement as was in his favour, the Court regarding the contract as divisible. *King v. Platau*, 12 N.S.W.L.R. (E.), 167. *Darley, C.J., Foster and Manning, JJ.* (1891).

N.S.W.

3.—**Contract relating to mining property—Specific performance—Laches.**—Where a plaintiff seeks specific performance of an executory contract relating to mining property, a brief delay in asserting his rights will be fatal to his claim. *Butler v. Saddle Hill G.M. Co.*, N.Z. L.R. 2 S.C., 296. *Williams, J.* (1884). N.Z.

4.—**Suit for specific performance of contract—Taking out miner's right as condition precedent.**—*See MINER'S RIGHT*, 43.

5.—**Sale of shares—Loan or sale—Obtainable in market.**—*See COMPANY*, 232.

### STAMPS

1.—**Stamp Act 1886—Conveyance on sale—Sale of interest in mining syndicate—Sale note—Description of property—Executory contract.**—A contract for sale which does not identify the

property to which it refers is not a conveyance on sale within the meaning of the *Stamp Act 1886*. An executory contract is not a conveyance on sale within the meaning of the *Stamp Act 1886*. *Per Boucaut, J.* :—An instrument, however, which for value passes a legal or equitable interest in specific property might be a conveyance on sale within the meaning of the *Stamp Act 1886*. *Clausen v. Haberle*, 22 S.A.L.R., 131. *Way, C.J., Boucaut and Bunday, JJ.* (1888).

S.A.

2.—Stamp Act 1882 (N.Z.), Schedule III.—Annual license fee of company—Exemption—Mining purposes—Power to promote and hold and deal with shares in other companies.]—A company formed for purposes of carrying on mining operations and the business generally of a mining company, also to acquire landed property and with power also to promote and hold and deal with shares in other companies: *Held*, not to be formed exclusively for mining purposes so as to be exempt from payment of annual license fee under *Stamps Act 1882*. *In re Progress Mines of New Zealand Ltd.*, 15 N.Z.L.R., 567. *C.A., Williams, Denniston and Conolly, JJ.* (1897).

N.Z.

## STATUTE

See MINING ACT 1874; STATUTE OF FRAUDS.  
See also Table of Statutes.

1.—Mining Statute — Residence area—Object of statutory provisions re.]—*Per Stawell, C.J.* :—“The object of the Statute is to give title by possession.” *Fancy v. Billing*, 7 V.L.R. (M.), 13; 3 A.L.T., 17 (1881). See RESIDENCE AREA.

V.

2.—Goldfields Act 1866 — Decision of Court of Petty Sessions—Court of Record.]—See PRACTICE, 259.

3.—Construction—Marginal notes—Prior legislation.]—Marginal notes in an Act of Parliament are not to be read as part of the Act. Upon a question of construction arising upon a subsequent Statute upon the same branch of law, it is legitimate to refer to the former Statute. *In re Baldwin*, 12 N.S.W.L.R. (L.), 128; 8 W.N., 39. *Darley, C.J., Windeyer and Innes, JJ.* (1891).

N.S.W.

4. — Statutory contract, breach of — Remedy,

whether injunction or compensation — Words, whether used in ordinary or technical sense — *Redhead Coal Mining Act Amendment Act 1889*.]

--The defendant company, being empowered by their Railway Act to construct a certain railway, caused an Amending Bill to be introduced in Parliament, with the object of obtaining extended powers of railway construction. The plaintiff company, who owned land over which a railway proposed in the said bill would run, opposed the bill on the ground that the said railway would interfere with the convenient working of their colliery, and of a certain railway which they intended to construct. Accordingly, the defendant company, to remove the plaintiff company's objections, consented to the insertion in the bill of a proviso as follows :—“Provided that the line of railway shall be at a distance of not less than 12 chains from the Scottish-Australian Mining Company's Durham colliery screens . . . with, at least, three openings of 26 feet span each.” The plaintiff company thereupon withdrew their opposition, and the bill, as thus amended, was passed. The defendant company constructed the line authorised by the Amending Act, with three openings of a less width than 26 feet clear, and of a height insufficient to permit a locomotive to pass under. The defendant company's Principal Act provided for compensation to be given to owners of adjoining land, in respect of breaches of the Act committed by the defendant company. *Held* (affirming *Owen, J.*), that the plaintiff company were entitled to come into Court for a mandatory injunction to restrain the breach of a statutory contract, and their rights were not limited to a claim for compensation. The Court, in determining whether the plaintiff's remedy should be an injunction or compensation, makes a distinction between a breach of a statutory contract, and what is merely a nuisance; and where there is a statutory contract the Court will not consider the question of carrying out the contract and doing something else in substitution for it, but will compel the performance of the contract at any cost. *Held*, also, that the word “span” was used in the ordinary sense of a clear opening, and not in the technical sense of a measurement from the centre of one support of a bridge to the centre of the next. *Held*, also, upon the evidence, that the term “openings” meant openings of such a height as to permit a locomotive to pass through, without excavation below the present

surface of the ground. *Scottish-Australian Coal M. Co. v. Redhead Coal M. Co.*, 13 N.S.W.L.R. (E.), 32. *Darley, C.J., Innes and Manning, J.J.* (1892). N.S.W.

5.—Construction—Crown lands—55 Vic. No. 1.]—General words in a Statute, however wide and comprehensive in their literal sense, must be limited according to the scope and object of the Act. *In re Flood*, 15 N.S.W.L.R. (L.), 330; 11 W.N., 24. *Darley, C.J., Innes and Foster, J.J.* (1894). N.S.W.

5a.—Victorian decisions on Mining Acts—How dealt with by Queensland Courts.]—*Per Griffith, C.J.*, at p. 78 :—"Now, it is a well-known fact that the mining law of Australia was practically made by the decisions of Mr. Justice Molesworth and the Supreme Court of Victoria. It is also well known that the *Goldfields Act* 1874, was based upon the mining law of Victoria. When, therefore, the Legislature of Queensland adopted, in section 69, language identical, so far as the present question is concerned, with that which had received a settled interpretation for many years in the Supreme Court of Victoria, it must be taken, I think, that the Legislature intended that the same meaning should be given to the words. On that ground, I think, we are bound by the ordinary rules of construction to hold that the law as declared in Victoria as to the construction of those words is the construction to be put on them in construing the *Goldfields Act* 1874." *Theodore v. Theodore*, 8 Q.L.J., 76. F.C. (1897). Q.

6.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32).—Proclamation of gold—Cancellation of lease—Time.]—Section 16 of the *Goldfields Act* 1866 (30 Vic. No 32) provides that "when any gold mine or goldfield shall have been discovered and proclaimed upon any Crown lands which at the date of the passing of this Act shall have been under license or lease for depasturing purposes it shall be lawful for the Governor, at his discretion, to cancel the license or lease under which such land shall have been held in occupation," &c. *Held*, that the word "when" in this section does not mean "at the time that," but "after the time that;" and that the words "shall have been" may be read as "are," and that when first used they apply to the time of the passing of the Act, and when they occur again they refer to the time of cancellation. *MacAn-*

*drew v. MacLean*, 2 N.Z.C.A., 198, 233; 1 N.Z. J.R., 178. C.A., *Arney, C.J., Johnston and Richmond, J.J.*; affirmed by J.C., *Sir J. W. Colville, Sir M. Smith, Sir R. P. Collier and Sir S. Martin* (1872-4). N.Z.

7.—Mining Statute 1865, sec. 43—Regulations—Ultra vires.]—See BY-LAWS AND REGULATIONS, 26.

8.—Statute—Repealed—Right of action on judgment—25 Vic. No. 4.]—See PRACTICE, 9.

9.—7 & 8 Geo. IV., c. 29, sec. 37—"Ore"—Larceny of—Definition of—"Mine" of the Queen—Prerogative.]—See CRIMINAL LAW, 5.

10.—Creditors Remedies Act—Miner's right in New Zealand—Residence in New South Wales.]—See PRACTICE (FOREIGN JUDGMENT).

11.—Mining Act 1874, secs. 15, 63—Construction.]—See LICENSE, 10.

12.—Acts Shortening Act 1858, sec. 11.]—See COMPANY, 108.

13.—Breach of statutory duty—Employer and Employee.]—See EMPLOYER AND EMPLOYEE, 8.

## STATUTE OF FRAUDS

See CONTRACT; SPECIFIC PERFORMANCE; PARTNERSHIP; MINING INTERESTS.

1.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 68—Statute of Frauds—Power of Warden to enforce contract not complying with.]—A Warden could, under sec. 68 of the *Goldfields Act* 1866, enforce a contract, notwithstanding that the provisions of the *Statute of Frauds* had not been complied with. *Doherty v. Atkins*, 1 N.Z.J.R. (N.S.) M.L., 2. N.Z.

2.—Partnership—Unwritten contract to admit as partner—Interest in mining lands—Statute of Frauds.]—See PARTNERSHIP, 25b.

## STEALING

See CRIMINAL LAW.

## STAY OF PROCEEDINGS

*Companies Act* 1874 (S.A.).]—See PRACTICE, 472.

**STOCK**

Shares.]—*See* PRACTICE (VESTING ORDER).

**STOCK EXCHANGE**

*See* COMPANY.

**STREAM**

*See* WATER.

**STREET**

*See* ROAD.

**STRIKING OUT CASE**

*See* PRACTICE, 107.

**SUBSIDENCE**

Subsidence of surface of mine — Mine worked according to covenants in lease.]—*See* LEASE, 79.

**SUBSOIL**

Goldfields Act (Q.), 1874 (38 Vic. No. 11), secs. 9-62, 64—Regulations 30, 60-72—Miner's right —Water rights—Gold mining lease — Right to subsoil.]— The holders of miners' rights being registered as proprietors of certain areas, called water rights, and being in occupation, and having performed all conditions, objected to a lease being granted for mining purposes, comprising part of their water rights, and claimed an injunction. *Held*, that assuming the facts stated, the defendant was entitled to mine under the surface occupied by the plaintiffs as water rights. *Hall v. Gorrie*, 3 Q.L.J., 113. F.C., *Lilley, C.J., Harding and Mein, JJ.* (1888). Q.

**SUBSTITUTION**

*See* PRACTICE, 347.

**SUGGESTION**

*See* COMPANY (WINDING UP).

**SUMMONS**

1.—Summons—Form of.]—*See* PRACTICE, 468.

2.—Warden's Court—Appeal to District Court —Amendment of summons.]—*See* PRACTICE, 442.

**SUNDAY**

*See* PRACTICE (ACTION).

**SUPREME COURT**

*See* PRACTICE, LXIII.

**SURFACE**

Coal mine—Lease—Subsidence of surface.]—*See* LEASE, 79.

**SURFACE DAMAGE**

Compensation for surface damage—Right of applicant for lease.]—*See* COMPENSATION, 5, 7, 8.

**SURPLUSAGE**

*See* EVIDENCE.

**SURRENDER**

Pastoral lease—New lease—Public maps—Boundary—Waste Lands Acts.]—*See* MAP.

## SURRENDER OF SHARES

See COMPANY (SHARES).

## SURVEYOR

**Mining surveyor—Duties of—Mandamus.]—**The mining surveyor ought to stand neutral between opposing parties; his duties are purely ministerial, nor should the probable result of a survey have any influence on him in any way, in the discharge of his duty. The Supreme Court will, if necessary, compel by *mandamus* a mining surveyor to make a survey. *Reg. v. Stephenson, ex parte Black*, N.C., 22. Banco (1869). V.

## SUSPENSION

See BY-LAWS AND REGULATIONS, 12.

**Verbal application—Excuse for forfeiture.]—***Semble*, that where by-laws provide that the Mining Registrar may grant a suspension certificate on the application, in writing, of a miner requiring the same, a verbal application is insufficient, and a suspension certificate granted on a verbal application only, is ineffectual as an excuse for not working a claim. *Brabender v. Gibbs*, 6 W.W. & A.B. (M.), 62; N.C., 71. *Molesworth, J.* (1869). V.

## SUSPENSION CERTIFICATE

**Forfeiture of claim—Suspension certificate.]—**See CERTIFICATE, 1, 2.

## SYNDICATE

**1.—“Syndicate”—Partnership—Parol agreement—Mineral lease—Promoters.]—**See PARTNERSHIP, 21.

**2.—Syndicate—Sale of interest in—Stamps Act 1886 (S.A.).]—**See STAMPS, 1.

## TAILINGS

See CROWN LANDS; GOLD.

**1.—Holder of miner's right—Part of freehold.]—**Certain auriferous tailings lying upon a machinery site had been purchased from the owner of the machinery site by a person who afterwards sold them to a mining company. The tailings had been lying on this spot since the year 1877, and the company or its predecessors in title had from time to time removed portions of them. The holder of a miner's right pegged out the land on which the tailings were, fenced it in, and refused to give the company possession of the tailings, claiming them as part of his freehold. In an action brought by the company for wrongfully depriving it of the tailings, the judge held that the tailings had become part and parcel of the freehold, and that it was impossible to determine where the freehold began and the tailings ended, and gave judgment for the defendant. *Held*, on appeal, that the County Court judge was wrong, and that the judgment below should be set aside and a new trial ordered. *Wallace Rethanga Mining and Smelting Co. v. Robinson*, A.R., June 4th, 1892. F.C., *Higinbotham, C.J., Holroyd and Hodges, JJ.* V.

**2.—Tailings area—Cancellation—Non-user—Regulations, 8th September, 1894.]—**Cancellation of a tailings area for non-user can only be done at the suit of the Crown, or by the Warden as a ministerial officer. *Missingham v. Smyth*, 8 Q.L.J. (N.C.), 26, followed. *Dodds v. Parsons*, 8 Q.L.J. (N.C.), 39. *Noel, D.C.J.* (1897). Q.

**3.—Tailings area—Auriferous sands claim—Regulation 30—Regulations 18th June, 1896.]—**An auriferous sands claim, notwithstanding Regulation 30, cannot be taken up on a tailings area. *Johns v. Fowler*, 8 Q.L.J. (N.C.), 40. *Noel, D.C.J.* (1897). Q.

**4.—Tailings area—Claim—Goldfields Homestead Leases Act 1886 (Q.), (50 Vic. No. 32)—Right to mine in a homestead area—34 Vic. No. 15—38 Vic. No. 11.]—**See HOMESTEAD AREA.

**5.—Tailings—Discharge of.]—**The holders of sluicing claims on the goldfields are not entitled to sluice and run off debris and sludge on the Crown lands of their watershed and on through the water channels and rivers of the country by virtue of their grants, either of sluicing claims, or of head races terminating at their claims, or of tail races. *Guffie v. Christian*, 1 N.Z.J.R. (N.S.) S.C., 96.



[NOTE.—But see now *Mining Act* 1891 (N.Z.), (54 & 55 Vic. No. 33), sec. 103, sub-secs. 150, 156.] N.Z.

6.—**Tailings — Discharge of — Trespass.**—Where a person cannot exercise a right to discharge water and debris from a gold mining claim without trespassing on his neighbour's land he is bound to refrain from exercising that right, and he may be held liable although he is only one of a number of persons whose united acts are doing the injury. *McMillan v. Great Extended sluicing Co.*, N.Z.L.R. 4 S.C., 377. *Williams, J.* (1886). N.Z.

7.—**Mining Act 1886 (N.Z.),** (50 Vic. No. 51), secs. 96, 97, 248 — **Regulation 201 — Stacked tailings—Protection.**—Secs. 96 and 97 of the *Mining Act* 1886 (50 Vic. No. 51), give the holder of a claim the exclusive right to tailings stacked upon the ground by a former holder where such tailings are not protected as provided by the regulations made under the Act. *Grayson v. Delaney*, 10 N.Z.L.R., 134. *Williams, J.* (1891). N.Z.

## TAIL-RACE

**Tail-race—Severance of wash-dirt from soil—Removal of by lessee after expiration of lease.**—There is not such a severance from the soil of wash-dirt in a tail-race as to entitle the holder of a mining lease to enter upon the ground and remove it from the tail-race after his lease has expired. *Grayson v. Delaney*, 10 N.Z.L.R., 134. *Williams, J.* (1891). N.Z.

## TAKING POSSESSION

See **ILLEGAL OCCUPATION.**

## TAXATION

**Costs.**—See **PRACTICE (COSTS).**

## TENANT

**Pastoral lease—Occupation license — Consent of tenant.**—See **LICENSE**, 21.

## TENANCY

**Tenancy from year to year—Mineral lease—Crown Lands Acts—Mining Act 1874.**—See **LEASE**, 49.

## TIMBER

**Miner's right—Cutting of timber—Proclaimed timber reserve.**—See **MINER'S RIGHT**, 32.

## TIME

1.—**Employing miner below ground more than eight hours a day—Half-hour for refreshment.**—See **EMPLOYER AND EMPLOYEE**, 2.

2.—**Computation—Company—Special Resolution—Meeting—Interval of not less than 14 days—Acts Shortening Act 1858.**—See **COMPANY**, 108.

## TITLE

See **FORFEITURE**; **MINER'S RIGHT**; **PRACTICE (INJUNCTION)**; **ROAD**; **TRESPASS.**

1. — **Disputed title — Securing the gold.**—Where there is in dispute a difficult question of title to auriferous land, the Court should, on an interlocutory application, endeavour to preserve the gold for the party ultimately succeeding. *Band of Hope and Albion Consols v. Young Band Extended Q.M. Co.*, 8 V.L.R. (E.), 120; 3 A.L.T., 125. *F.C., Stawell, C.J., Williams and Holroyd, JJ.* (1882). V.

2.—**Complication of title—Costs.**—Where a company had complicated its rights, and its title to ground was unsuccessfully impeached: *Held*, not entitled to costs. *Fattorini v. Band and Albion Consols*, 9 V.L.R., (M.), 1; 4 A.L.T., 121. *Molesworth, J.* (1883). V.

3.—**Re-registration of amalgamated claim—Prior titles.**—See **CLAIM**, 22.

4.—**Mining claim—Block and frontage claims—Inconsistent titles.**—See **CLAIM**, 12.

5.—**Mining Act (N.S.W.),** (37 Vic. No. 13), sec. 70 — **Complaint — Complainant's title.**—See **PRACTICE**, 429b.

6.—Crown lands—Married woman.]—See CROWN LANDS, 25.

7.—Injunction to restrain injury to lateral support—Plaintiff may rely on possession alone.]—See LATERAL SUPPORT.

8.—Riparian rights—Action for interference with—Title.]—See WATER, 28.

9.—Taking claim in execution—Interpleader—Title to land—Jurisdiction.]—See PRACTICE, 204.

10.—Title to land—Jurisdiction of Warden's Court.]—See PRACTICE, 238.

## TITLE DEED

Miner's right not a.]—See MINER'S RIGHT, 38.

## TORT FEASORS

Action for fouling stream—Joint tort feasors—Parties.]—See PRACTICE, 302.

## TRANSFER

See COMPANY (SHARES); PRACTICE (PARTIES).

1.—Mining Statute 1865 (No. 291), secs. 7, 8—Ballarat By-laws XI.—Transfer of claims—Transferee holding one miner's right.]—See CLAIM, 15.

2.—Water-race license—Notice of transfer.]—See LICENSE, 4.

3.—Residence area—Marking out—Constructive abandonment—Adjudication.]—See RESIDENCE AREA, 9.

4.—Transfer of claim—Registration—Administrator.]—See ADMINISTRATOR.

## TRANSFER OF SHARES

See COMPANY (SHARES).

## TRESPASS

See ACQUIESCENCE; BY-LAWS AND REGULATIONS; CLAIM; COMPANY; DAMAGES; ESTOPPEL; LEASE; MINER'S RIGHT; PRACTICE (INJUNCTION, PARTIES, WARDEN); PRIVATE PROPERTY; ROAD.

1. — Removal of gold from claim — Damages for encroachment — Jurisdiction of justices and assessors—Distress—Seizure of gold—Goldfields Act (18 Vic. No. 37), sec. 12.]—The Act 18 Vic. No. 37, sec. 12, made it lawful for the justice of the peace therein mentioned and the assessors appointed under the Act, or for any two justices of the peace, upon proof of any gold having been removed from any claim, to cause the gold so removed to be summarily seized and delivered to the complainant; and further empowered them, whether any such gold should have been so seized or detained or not, to cause the damages, for the encroachment in the Act mentioned, to be paid by the person encroaching, to be recovered by distress and sale of his goods. *Held*, that the justice and assessors were not authorised to make an order that the encroaching party should deliver up a certain number of ounces of gold, or that a distress therefor should be made upon his goods, but that the only order they could make was an order to summarily seize and deliver to the owner some specific gold, the subject of dispute. *Reg. v. Justices of* ———, *ex parte Armstrong*, 1 V.L.T., 219. *a'Beckett, C.J., Barry and Williams, JJ.* (1856). V.

1a.—Encroachment—Construction of Goldfields Act (18 Vic. No. 37), sec. 15 — Second encroachment.]—The section applies only to persons having conterminous claims and disputed boundaries. *Reg. v. Read*, 1 V.L.T., 206. *a'Beckett, C.J., Barry and Williams, JJ.* (1856). V.

1b.—Possession—Pendency of Warden's summons—Title of third party.]—The Temperance Company held a claim at Ballarat in excess of the quantity of ground allowed by the by-laws. T. went on the ground held in excess, marked it out, registered it and took possession of it as if unoccupied. At the time that T. so took possession, a Warden's summons to be put in possession of the ground, issued at suit of P. as against the Temperance Company was pending, and was heard after T. had taken possession, and an order was made in favour of P. as against the Temperance Company. After he got the order

P. proceeded to mark out the ground already occupied by T., who then summoned P. for a trespass on his claim. The Temperance Company also remained in possession. *Held*—(1.) That T. could take possession of and occupy the land in question and so acquire a title thereto as a claim as against P., and all persons entering and marking out after him. (2.) That T. could not legally take possession of the ground, but his going through the form of doing so would have the effect above mentioned. (3.) That the Warden might find that P. had committed a trespass in going on the land. (4.) That P. could not set up the title of the Temperance Company as against the complainants. (5.) And that the complainant T. was entitled to have P. restrained from trespassing upon, and removed from the land in dispute. *Truswell v. Powning*, 1 V.R. (M.), 13; 1 A.J.R., 18. *Molesworth, J.* (1870). V.

2.—*Amalgamated claims.*—Trespass upon one of several amalgamated claims is not necessarily a trespass upon all of them. *St. George and Band of Hope United Co. v. Band and Albion Consols*, 2 V.R. (E.), 206; 2 A.J.R., 81. *Molesworth, J.* (1871). V.

3.—*Land Act (No. 117)—Temporary reserve—Residence area—Mining Statute (No. 291), sec. 14—Possession as against wrongdoer.*—In February, 1862, by proclamation in the *Government Gazette*, certain land at Sandhurst was temporarily reserved under the *Land Act* (No. 117) from sale, and permissive occupancy given to the Municipal Council of Sandhurst for the supply of gravel and similar purposes. In 1867 G., the holder of a miner's right, took up and occupied a portion of the land as a residence area. In 1871, by proclamation in the *Gazette*, the land was exempted from mining operations under Act No. 291, sec. 14. The Municipal Council then brought an action of trespass against G. Verdict for defendant. On rule *nisi* to enter verdict for plaintiffs for nominal damages: *Held*—(1.) That G.'s possession must be considered as having been taken subject to the proclamation reserving the land for the purpose of taking gravel, and that G. was not entitled to any compensation on being removed. (2.) That under the proclamation of 1871 G.'s rights, whatever they were, ceased. (3.) That the Council, having been in possession at the time of G.'s entry, were entitled to treat

him as a trespasser. Rule absolute to enter verdict for plaintiffs. *Mayor of Ballarat v. Shire of Bungaree*, 1 V.R. (E.), 57, followed. *Sandhurst v. Graham*, 3 A.J.R., 79. Banco (1872). V.

4.—*By-law—Process.*—A person in possession of ground as a claim, although the claim may have been taken up under an illegal by-law, is to be disturbed only by legal process. *Bottrell v. Waverley G.M. Co.*, 2 V.R. (M.), 16; 2 A.J.R., 133. *Molesworth, J.* (1871). V.

5.—*Jus tertii—Mining underneath streets.*—In a contest between two persons as to their title to a mine underneath a street, an assertion that the defendants have not obtained from the proper authorities permission to mine underneath the street gives the plaintiff no title. A *jus tertii*, or the alleged power of intervention by third persons to prevent an unauthorised act, which power has not been exercised, cannot be set up by a trespasser who has not a shadow of title in himself against a trespasser in prior occupation of the *locus in quo*. *St. George and Band of Hope Co. Regd. v. Band of Hope and Albion Consols Co.*, 2 V.R. (E.), 206; 2 A.J.R., 127. Full Court (1871). V.

6.—*Lease—Act No. 291, secs. 24, 101—Warden—Jurisdiction.*—When a lease is granted under Act No. 291, sec. 24, the lessee may bring a complaint against any person trespassing on the leased land, whether the trespass be merely on the surface—as by erecting a fence—or otherwise; and a Warden has jurisdiction to hear and determine the complaint by Act No. 291, secs. 101 and 177. *Extended Cross Reef Co. v. Creaver*, 4 A.J.R., 10. *Molesworth, J.* (1873). V.

7.—*Prior occupation—Legality—Issues.*—In a suit for trespass, when plaintiffs prove prior occupancy *de facto*, it is no defence that they had not complied with by-laws. *Semble*, that when issues have been settled before trial by judge and assessors, the trial must be confined to those issues. *Wearne v. Frogatt*, 2 V.L.R. (M.), 6. *Molesworth, J.* (1876). V.

8.—*Actual possession—Act No. 291, secs. 195, 197—Practice.*—The holder of a miner's right who has established his title to a claim as against others who retain actual possession after judgment against them, can sue the latter for trespass under the Act No. 291, sec. 197, although he has

never been in actual physical possession of the ground, and is not obliged to proceed under sec. 195 as for ejectment. *White v. Perriam*, 5 V.L.R. (M.), 31. *Molesworth, J.* (1879). V.

9.—*Bona fide belief of title—Damages.*—A trespasser who has a *bona fide* belief of his title, in action by the true owner for value of gold extracted from quartz taken from a mine, is entitled to receive credit for the "hewing" of the ore from the rock *in situ*, and also for the "hauling" to the surface. *Munro v. Sutherland*, 5 A.J.R., 76. *Banco* (1874). V.

10.—*Parties—Tributors—Possession—Reversionary interests.*—Lessees who have let their mines on tribute, and of which the tributors are in possession, cannot sue third parties for trespass upon it. They may sue for damages to their reversionary interest. *Penistan v. Great Britain Co.*, 5 A.J.R., 18. *Molesworth, J.* (1874). V.

11.—*Vague description—Particulars—Practice—Application for lease.*—In a complaint for trespass a general description of the *locus in quo* is enough, as further particulars, if required, may be obtained on application to the Warden. The marking off and applying for a lease of land held by the owner of a miner's right is not a trespass upon, or an unlawful interference with the land within the meaning of the Act No. 291, secs. 177, 101, sub-sec. 3. *Stephens v. Jolly*, 5 A.J.R., 162. *Molesworth, J.* (1874). V.

12.—*Encroachment—Gold in machine area.*—Where a miner holding a miner's right occupied land as a machine site under a permit from a Warden who had no power to grant it, brought encroachment against other miners, within the boundaries of whose claim the land so occupied was included, for undermining and removing gold: *Held*, that the plaintiff had no title to the gold, and that the defendants had; and that it was not necessary that the defendants should have obtained from a Warden an order establishing their right. Under the Act No. 32, sec. 77, according to *Critchley v. Graham*, 2 W. & W. (L.), 211, it is necessary to obtain the adjudication of the Warden only as against persons having possession and claiming to occupy under Act No. 32. In this case neither of the litigants was in actual possession of the gold in dispute, until it was reached. *Vivian v. Dennis*, 3 W.W. & A'B. (M.), 34. *Molesworth, J.* (1866). V.

13.—*Encroachment—Frontage claims.*—The holders of a frontage claim under By-law 10, Ballarat, were entitled to exclude persons from obtaining registration for, and occupying block claims within all parts of the surface boundaries or parallels of the frontage claims, without regard to the gutter or lead passing through. *United Extended Band of Hope Co. Regd. v. Tennant*, 3 W.W. & A'B. (M.), 54. *Molesworth, J.* (1866). V.

14.—*Encroachment—Possession.*—Where several are at the same time in bodily occupation of the same place, the law adjudges possession to the persons entitled to it. All others are mere trespassers, and cannot maintain trespass against one another. *United Sir William Don G.M. Co. Regd. v. Kohinoor G.M. Co. Ltd.*, 3 W.W. & A'B. (M.), 79. *Molesworth, J.* (1866). V.

15.—*Encroachment—Frontage claims—Priority of title.*—*United Extended Band of Hope Co. v. Tennant* (*supra*) regarded the rights of a frontage claimholder, under the by-law of July, 1859, as against one taking up a block claim. Both the local Court regulations and by-laws contemplated the existence of simultaneous rights to frontage claims intersecting one another, yet omitted to give specific directions as to their priorities. In that case, as the spirit of the regulations and by-laws was to make a frontage claim a right on a lead only, the prohibitions to interference with a frontage claim on a lead undefined were not intended to apply to frontage claimants on other leads intersecting, but priority of title depends on the question which lead the gold is upon. *United Working Miners G.M. Co. Regd. v. Albion G.M. Co. Regd.*, 4 W.W. & A'B. (M.), 1. *Molesworth, J.* (1867). V.

16.—*Unintentional encroachment.*—*Semble*, where an encroachment by a neighboring company has been unintentional and unconcealed, the company encroaching is entitled to be allowed the cost of working the ground encroached upon. *St. George United Co. v. Albion Co.*, 4 W.W. & A'B. (M.), 88. *Molesworth, J.* (1867). V.

17.—*Encroachment—Title of plaintiffs.*—The third sub-section of the *Mining Statute*, sec. 101, does not confine the remedy for trespass to plaintiffs having a good title, nor does it indirectly oblige them to show a good title, in addition to showing their possession undisturbed.

Possession is *prima facie* evidence of title, and is sufficient evidence against a mere wrong-doer. A defect in plaintiff's title, suing for a trespass, does not subject them to be defeated in the suit by the defendants entering without legal process, according to the principle of *Critchley v. Graham*, 2 W. & W. (L.), 211. *Cruise v. Crowley*, 5 W.W. & A.B. (M.), 27. *Molesworth, J.* (1868). V.

18.—Encroachment — Title — Possession — Wrongdoer.]—A person in possession of a mine under a good or bad title may maintain a complaint for encroachment against a wrongdoer, having no colour of title. *Osborne v. Elliot*, 6 W.W. & A.B. (M.), 49; N.C., 20; A.R., 14th Sept., 1869. *Molesworth, J.* V.

19.—Encroachment — Abandonment — Actual occupation—Application for lease.]—On the 13th March, 1869, the Barker's Gold Mining Company, Registered, applied for a lease of auriferous land at Godfrey's Creek. In May, Keating and party pegged out, and took possession of the ground so applied for, as claims, under their miners' rights. In June the Barker's Company pegged out the same ground as claims under miners' rights. In July the application for lease was refused, and on the refusal the Barker's Company re-pegged and re-registered the ground as claims. The Barker's Company then sued Keating and party in the Court of Mines for encroachment and interference with their claims. Keating and party remained in actual occupation of the ground from the time of their first marking out. The judge of the Court of Mines decided in favour of Keating and party. *Held* (on appeal to the Chief Judge)—(1.) That taking up claims afresh is an abandonment of title acquired by any previous taking up. (2.) That when persons are in actual occupation of ground, though the occupation may not be strictly legal or regular, other persons have no right to come in upon them and disturb such possession, but can only take advantage of any defect in the title by proceeding before the Warden or in the Court of Mines. (3.) That the application for lease did not prevent any person from taking up the ground applied for as claims under miners' rights. In case the lease should be granted the lessee could proceed for encroachment and for restitution of gold taken out of the leased ground. (4.) That the decision of the Court below was right. *Semhle*, that registration

within the time prescribed by the by-laws is part and parcel of the title. It is the point from which the obligation to work begins. *Barker's G.M. Co. Regd. v. Keating*, 1 V.R. (M.), 18. *Molesworth, J.* (1870). V.

20.—Encroachment—Value of land taken—How estimated.]—When one man encroaches on the auriferous ground of another and removes the soil and disposes of the gold taken therefrom, in a suit against the trespasser, so far as there is scope for doubt as to the value of the soil taken, valuations should be made high with the feeling of *odium spoliatoris*, and wilful trespassers will not be allowed, in taking an account of the value, the expenses of mining and separating the gold. *Attorney-General v. Boyd*, 3 A.J.R., 99. *Molesworth, J.* (1872). V.

21.—Encroachment—Boundaries — Plan—Inspection.]—In a suit between B. company and G. company respecting an encroachment a plan attached to an agreement as to boundaries was put in evidence. The plan being found defective, inspection was ordered to be made to ascertain how far the G. company had driven or worked at the place of the alleged encroachment. *Band and Albion Co. v. St. George United Co.*, 3 A.J.R., 20. *Molesworth, J.* (1872). V.

22.—Encroachment — Damages — How estimated as against trespassers.]—In cases where there is no actual proof of the amount of damage done by an encroachment—when it is a mere matter of calculation—the maxim, that as against trespassers the highest value is taken, applies. When in such a case the Master in Equity reported the amount of gold taken at a very high estimate, the Court declined to interfere with his decision. *Attorney-General v. Boyd*, 3 A.J.R., 130. F.C. (1872). V.

23.—Attorney-General—Mining Statute 1865 (No. 291), sec. 37—Practice.]—Proceedings for trespass under sec. 37 of the *Mining Statute* 1865 (No. 291), need not be taken by the Attorney-General. *Robertson v. Morris*, 7 V.L.R. (M.), 1; 2 A.L.T., 109. *Molesworth, J.* (1881). V.

24.—Parties.]—The Attorney-General and freehold owners of land, may join in a suit to restrain a trespasser from mining for gold on the land. *Attorney-General v. Lansell*, 8 V.L.R. (E.), 155; 3 A.L.T., 141. F.C., *Stavell, C.J.*, *Higinbotham and Williams, J.J.* (affirming *Molesworth, J.*), (1882). V.

**25.—Trespass—Evidence of.]—**Where land was found to have been undermined, and the only communication with the part undermined was by drives from a shaft on adjoining land: *Held*, that in the absence of evidence to the contrary this afforded evidence of a trespass and removal of the subsoil by the owner of such shaft. *Ibid.* V.

**26.—Removal of quartz by trespasser—Evidence to support decree for accounts.]—**Where it was proved that a large quantity of quartz had been removed by the defendant, a gold miner, from below the surface of land adjoining his, by means of drives from his shaft, and had been raised up his shaft and crushed at his battery: *Held*, that in the absence of evidence to the contrary, this afforded sufficient evidence that the quartz was auriferous to warrant a decree for an account of the value of gold removed by him. *Ibid.* V.

**27.—Uncertificated insolvent—Right to bring action for trespass.]—**An uncertificated insolvent who holds a miner's right may maintain a complaint before a Warden for trespass on a residence area, and his assignee is not a necessary party to such a proceeding. *Fancy v. North Hurdsfield United Co.*, 8 V.L.R. (M.), 5; 3 A.L.T., 89. *Stawell, C.J.* (1882). V.

**28.—Amalgamated claims—Registration—Trespass.]—**Where a complainant was registered for two claims which had been amalgamated, but the amalgamated claim had not been separately registered, and trespass was proved on the amalgamated claim, but there was nothing to show on which of the two original claims the trespass was committed: *Held*, that the complainant could not succeed. *United Claims Tribute Co. v. Taylor*, 8 V.L.R. (M.), 19. *Molesworth, J.* (1882). V.

**29.—Trespass—Wrongful possession of claim.]—**The plaintiffs claiming that the defendants were in possession of land under a lease which was, as the plaintiffs alleged, void, marked out the land under miners' rights as a claim, registered the claim and entered upon it. They were immediately expelled by the defendants, and then brought a plaint for trespass against the defendants. *Held*, that they could not proceed in trespass, and that they wrongfully took possession without legal warrant. *Whitely v. Schlemm*, 8 V.L.R. (M.), 58; 4 A.L.T., 115. *Molesworth, J.* (1882). V.

**30.—No-liability company—Action for trespass by—Non-payment of five per cent. of capital at time of registration.]—**A no-liability company under the *Mining Companies Act 1871* (No. 409), having an assignment of a lease under the *Mining Statute 1865* (No. 291), suing for trespass or injury upon the leased land may be defeated by the defendant showing that one-fifth of its capital was not paid up at the time of its registration. *Park Co. v. South Hustler's Reserve Co.*, 9 V.L.R. (M.), 4; 4 A.L.T., 135. *Molesworth, J.* (1883). But see *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281 (REGISTRATION, 10). *Owen J.* (1896). V.

**31.—Encroachment to mine—Mining quartz raised—Wilful trespasser—Cost of mining.]—**In a suit for a mining encroachment the Master found the respective quantities of auriferous quartz raised from the plaintiffs and defendant's lands by the defendant, a trespasser upon the plaintiff's land, and the total yield of gold from the entire quantity, but that there was no evidence to show how much was from each. *Held*, that the plaintiffs were entitled upon the doctrine of *per confusionem* to all the gold, and that the defendant was not entitled to deduct the expense of raising and crushing the quartz obtained from the plaintiff's land; but that he was entitled to the expense of raising and crushing the quartz obtained from his own land. *Attorney-General v. Lansell*, 10 V.L.R. (E.), 84. *Stawell, C.J.* and *Holroyd, J.* (reversing *Molesworth, J.*), 9 V.L.R. (E.), 172; 5 A.L.T., 71 (1883-4). V.

**32.—Mining Statute 1865 (No. 291), sec. 37—Trespass pending application for lease—Marking out residence area.]—**The provisions made by sec. 37 of the *Mining Statute 1865* (No. 291), that when an applicant for a mining lease shall have marked out the land in accordance with that section, an entry upon such land by a person who shall not previously have been in lawful occupation thereof shall be deemed a trespass, does not mean a trespass against the whole world but only against the applicant for the lease, and the marking out of a residence area pending the application for a lease of the same land is not illegal and useless except as against the applicant for the lease if the lease be ultimately granted. *Gorman v. McLellan*, 14 V.L.R., 674; 10 A.L.T., 51. *Holroyd, J.* (1888). V.

**33.—Adjacent mines — Encroachment — Accidental — Gold removed — Damages — Cost of extracting gold.]**—In an action to recover the value of gold wrongfully taken from a mine by an adjacent mine owner in the course of carrying on his mining operations, where the encroachment is accidental, and not wilful, the Court will allow to be deducted from the value of gold removed the cost of raising and extracting it. *Lehan v. Dillon*, 19 V.L.R., 730. *Hood, J.* (1893). V.

**34.—Mines Act 1890 (No. 1120), sec. 65—Marking out land for lease—Compliance with regulations — Trespass.]**—A regulation required that, prior to application for a lease, the applicant should erect on the land applied for posts, painted white, of a certain height, to define accurately the boundaries and angles, with a metal plate, having painted thereon the words "applied for lease," and the name of the applicant, or if more than two, the first two applicants, legibly painted thereon. In a case where there were three applicants, and the name of only one appeared, the posts being saplings, and not painted white until after the defendants, in an action for trespass, had marked out a claim over the same land: *Held*, that there had not been a substantial compliance with the regulation, and that an action for trespass would not lie. *Allison v. Sharp*, 17 A.L.T., 240; 2 A.L.R., 50. *a'Beckett, J.* (1896). V.

**35.—Mines Act 1890 (No. 1120), sec. 65—Marking out land for lease — Trivial departure from regulations — Trespass.]**—*Semle*, a trivial departure from the exact terms of the regulations as to marking out land applied for would not be fatal to an applicant for a lease, suing for trespass under sec. 65 of the *Mines Act* 1890 (No. 1120). *Allison v. Sharp*, 17 A.L.T., 240; 2 A.L.R., 50. *a'Beckett, J.* (1896). V.

**36.—Gross carelessness as to boundaries—Location of a grant—Part of a defendant's plan treated as an admission—Rejection of other parts of plan.]**—O. took proceedings against A., an adjoining land owner, to recover the value of coal taken from beneath O.'s land. From the description in the original Crown grant of O.'s land it was not possible to fix its locality except in its relative position to other contiguous grants; but these grants, in turn, could not be located, as, although the lengths and directions

of the sides were given, no physical point on the ground was mentioned as a starting point in any of the grants. It was proved by a surveyor who inspected the country that, assuming a point where four fences met to be the corner of one of these contiguous grants, the lines of all the other grants—nine in number—corresponded in length and direction with surveyor's marks on the land, line trees and corner trees, the marks upon which were apparently of the same date as the date of the grant, and that there were no other surveyor's marks on the land. The corner trees found corresponded also with the corner trees specified by the Government surveyor in his original survey for the Crown before the grants issued. If this position was correct A.'s trespass amounted to 14 acres. The working plan of A.'s mine, which purported to show the boundaries of the various grants referred to, showed a trespass of only six acres. It was shown that certain of the lines in this plan tallied with the plan of O.'s surveyor, and that where they did not tally there was an error in the plotting of the lengths of the several deed lines of A.'s land. *Held*, that upon this evidence O. had located his grant in the position he contended for so as to show a trespass of 14 acres, and that he was not concluded by the amount of trespass shown in A.'s plan. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W. L.R. (E.), 242. *Owen, J.* (1896). N.S.W.

**37.—Mine—Trespass by adjoining owner—Measure of damages—Fraudulent entry.]**—When the owner of a coal mine wilfully or through gross negligence mines beyond his boundary the person whose coal is taken is entitled to the value of the coal at the pit's mouth, without any deduction for the cost of hewing and getting. *Martin v. Porter*, 5 M. & W., 351; *Wood v. Morewood*, 3 Q.B., 440, and *Hilton v. Woods*, L.R. 4 Eq., 432, followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242. *Owen, J.* (1896). N.S.W.

[NOTE.—See also *Whitwham v. Westminster Brymbo Coal and Coke Co.* (1896), 1 Ch., 894; *Jegon v. Vivian*, L.R. 6 Ch., 742; *Phillips v. Homfray*, L.R. 6 Ch., 770.]

**38.—Mine — Trespass by adjoining owner — Statute of Limitations.]**—Where the owner of a coal mine mines beyond his boundary, such trespass is *prima facie* fraudulent, and if by the



action or inaction of the trespasser, such fraud is concealed from the owner of the adjoining land, the *Statute of Limitations* does not begin to run until the trespass has been discovered or could, with reasonable diligence, have been discovered. *Gibbs v. Guild*, 9 Q. B. D., 59; *Trotter v. McLean*, 13 Ch. D., 574; and *Ecclesiastical Commissioners for England v. N.E. Railway Co.*, 4 Ch. D., 845, approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242. *Owen, J.* (1896). N.S.W.

**39.—Claim—Action for interference with—Maintenance of pegs and boundaries.]**—Where the pegs and boundary marks of an extended claim have not been properly maintained the claim-holder cannot maintain an action for interference with his ground against a person who has been misled and has marked out another claim upon it. *Harris v. Labes*, 1 N.Z.J.R. (N.S.) M.L., 10. N.Z.

**40.—Possessory title.]**—A party of miners having contracted by deed for the purchase of all the estate and interest in certain mining ground of persons who had applied for and had obtained a certificate in the names of third persons, for a gold mining lease of the ground in question, went into possession and worked the ground. While in possession, and before the execution of the lease by the lessees, they commenced proceedings in the Warden's Court for trespass against certain other persons. The Warden dismissed the complaint on the ground that the complainants did not show title under the lease. *Held*, that the complainants were not bound to show a perfect title, and that as they had miners' rights and were in *bond fide* possession of the ground under a *bond fide* contract of purchase they could maintain an action for trespass against mere wrongdoers. *Ah Tan v. Kapatzo*, 1 N.Z.J.R. (N.S.) M.L., 16. N.Z.

**41.—Trespass—Mining lease—Marking out—Goldfields Act 1866 (30 Vic. No. 32), sec. 108.]**—An applicant for a mining lease who has not complied with the regulations in force as to the manner in which ground applied for should be marked out, cannot maintain an action for trespass against the holders of miners' rights for entering on the land and marking out claims upon it in the manner prescribed by the regulations. If, however, the claims had been insufficiently marked out, the parties marking them

out would have been mere wrongdoers and would have been liable in trespass. *Higgins v. Dyer*, 1 N.Z.J.R. (N.S.) M.L., 26. N.Z.

**42.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32), sec. 15—Trespass to land—Cattle—Damages.]**—Sec. 15 of the *Goldfields Act 1866* (30 Vic. No. 32), provided that any person depasturing cattle on Crown land held under depasturing lease within a goldfield without the sanction of the lessee should be adjudged to pay to such lessee, by way of damages for each offence, any sum not exceeding ten shillings per head. *Held*, that this was confined to compensation for damage by depasturing only, and did not prevent the lessee from recovering for consequential damages for injuries arising from trespass beyond the injury by depasturing. *Cargill v. Mervyn*, 2 N.Z.J.R. (N.S.) S.C., 50. N.Z.

**43.—Tailings—Discharge of—Trespass.]**—Where a person cannot exercise a right to discharge water and debris from a gold mining claim without trespassing on his neighbour's land, he is bound to refrain from exercising that right, and he may be held liable although he is only one of a number of persons whose united acts are doing the injury. *McMillan v. Great Extended Sluicing Co.*, N.Z.L.R. 4 S.C., 377. *Williams, J.* (1886). N.Z.

**44.—Crown grant—Reservation of minerals—Trespass—Injunction.]**—*See LEASE*, 68, 69.

**45.—Encroachment—Order for inspection—Obstacles presented by defendant—Attachment.]**—*See MINE*, 3.

**46.—Encroachment—Practice—Injunction—Proving different case.]**—*See PRACTICE*, 188.

**47.—Mining license—Licensors—Information and bill.]**—*See PRACTICE*, 298.

**48.—Encroachment—Acquiescence—Interlocutory injunction.]**—*See PRACTICE*, 189.

**49.—Mining lease—Residence area—Mining Statute 1865, secs. 5, 24.]**—*See RESIDENCE AREA*, 8.

**50.—Mining Statute 1865 (No. 291), secs. 42, 43, 45—Declaration of forfeiture of lease—Re-entry by Crown—Suit for trespass by lessee in possession—Parties.]**—*See LEASE*, 29.

**51.—Summons for diverting and abstracting water—Prospective injury—Trespass.]**—*See WATER*, 5.



52.—Estoppel—Trespass.]—See ESTOPPEL, 3.

53.—Mines Act 1890 (No. 1120), secs. 301, 303 —Mining on private property—Lease from owner of land—Lease from Crown—Right of owner under original lease.]—See LEASE, 43.

54.—Mines Act 1890 (No. 1120), secs. 15, 19, 135, sub-secs. 1, 3, 12—Trespass to public road —Jurisdiction of Warden.]—See PRACTICE, 228.

55.—Forfeiture — Crown — Act evidencing intention—Goldfields Act 1866 (repealed)—Regulations.]—See FORFEITURE, 55.

56.—Practice — Mining Act 1874, sec. 129 — Forcibly taking possession — Evidence.] — See PRACTICE, 422.

57.—Entry on Crown lands — Applicant for mineral lease — Marking boundaries.] — See LEASE, 51, 52.

58.—Mineral license — Lease — Mining Act, Regulation 27.]—See LICENSE, 9.

59.—Miner's right — Mining lease — Regulations 28 and 33—"Until and unless"—Mining Act 1874, sec. 40.]—See LEASE, 57.

60.—Crown lands—Proclaimed goldfield—48 Vic. No. 18, sec. 45.]—See CROWN LANDS, 18, 19.

61.—Goldfields Act 1874 (Q.), secs. 2, 10, 14 —Mining lease—Crown lands—Royal mine.]—See LEASE, 69.

62.—Removal of gravel — Crown lands — Damages.]—See CROWN LANDS, 25.

## TRIBUTE

See COMPANY, XXI, 190, 191; CRIMINAL LAW; FORFEITURE; LEASE; MINER'S RIGHT; PRACTICE, 227; TRESPASS.

1.—Condition precedent—Repairs—Agreement.]—Where tributors had agreed to allow the owners of auriferous land to retain certain money as security against injury to their property, and also agreed to repair damage, and to deliver up property in good order: *Held*, that the making of the repairs was a condition precedent to the repayment of the money. *Great Gulf Co. v. Sutherland*, 4 A.J.R., 158. Banco (1873). V.

2.—Mining Act 1886 (N.Z.), (50 Vic. No. 51),

sec. 217 — "Person employed" — Tributor.] — See COMPENSATION, 11.

3.—Mining company — Exclusive license — Tribute agreement.]—See LICENSE, 3.

4.—Larceny—Property in gold—Tributors.]—See CRIMINAL LAW, 9.

## TRUSTS

1.—Goldfields Act (18 Vic. No. 37), sec. 3—Recognition of trusts.]—*Per Moleworth, J.*:—"I think it questionable whether the language of that section (sec. 3 of 18 Vic. No. 37) by itself makes possession the test of ownership so as to prevent the legal recognition of trusts against an assignee." *Conway v. Rossiter and Chapman*, 1 V.L.T., 159, at p. 160 (1856). V.

2.—Judicial direction to trustees—26 Vic. No. 12.]—Opinion of judge under 26 Vic. No. 12, as to power of trustees to raise money by mortgage for breaking mines, and for payment of debts and legacies. Judge required by act to give advice on questions of law, but not to tell trustee how to exercise a discretionary power. *In re Osborne*, 2 N.S.W.S.C.R. (E.), 89. *Milford, J.* (1863). N.S.W.

2a.—Trustee Act 1852—Goldfields Act 1861—Crown Lands Alienation Act 1861 — Vesting order.]—In 1862, L.T. and J.T., as partners, occupied, under a business license issued in accordance with the *Goldfields Act* 1861, a parcel of land in Forbes, and erected thereon business premises. Thereupon they applied, under sec. 8 of the *Alienation Act* 1861, to purchase that parcel of land in consideration of those improvements. In October, 1862, L.T. sold his interest in the business to J.T. and retired from the partnership. In December, 1862, J.T. mortgaged the land and premises to J.H. On the 31st January, 1863, J.T. absolutely conveyed all of his right, title or interest in the land and premises to J.H. in fee. In April, 1863, J.H. paid into Colonial Treasury £37 8s., the price duly fixed by appraisal under sec. 8 of the *Crown Lands Alienation Act* 1861, for the purchase of the parcel of land. That sum was paid out of his own moneys, but was expressed to be paid by him as agent for L.T. and J.T. under the impression that, as they had been the original

occupiers of the land, and as they had applied to purchase in consideration of improvements, the grant could only issue in their names. On the 6th December, 1865, a grant of the land from the Crown was issued in the names of L.T. and J.T. in fee as tenants in common. L.T. and J.T. left Forbes before 1865, and could not be found. Since 1863 J.H. had been in peaceable possession of the land and the premises. The grant from the Crown had always remained in the possession of the Registrar-General. On a petition setting out those facts, a vesting order was granted to J.H. *Ex parte Herring*, 1 N.S.W.L.R. (E.), 12. *Hargrave, J.* (1880).

N.S.W.

3.—Trust deed—Sale under power—Excessive demand—Proviso for protection of purchasers—Notice—Breach of trust—Avoidance of sale—Account when taken.]—To secure advances plaintiffs assigned to defendant B. all their interest in a coal mine on trust to carry on the same, and in certain events to sell. B. made a demand on the plaintiffs for an amount largely in excess of what was due to him under the deed, and in default of payment sold the property to the other defendants, S. and S. *Held*, that B. did not stand in the same position as a mortgagee, but that he was a trustee, and that consequently he was not justified in selling the property on the plaintiffs failing to tender the amount due to him. *Held* also, that a clause in the deed of trust providing for the protection of purchasers from B., by exonerating them from injury, did not operate to protect them in the event of their having express notice of the breach of trust committed by B.; and, *held* also, (*Stephen, J., diss.*), that the defendants, other than B., had such notice. *Harper v. Brown*, 8 N.S.W.L.R. (E.), 86; 1 W.N., 79. *Faucett, Innes and Stephen, JJ.* (1884).

N.S.W.

4.—Co-owners in mining properties—Trustees—Partners.]—Co-owners in mining properties are not *ipso facto* either partners or co-partners one for the other, although under special circumstances such relations frequently and constantly arise. *Little v. McDonald*, 1 Q.L.J., 124. *Harding, A.C.J.* (1833).

Q.

5.—Goldfields Act 1874 (38 Vic. No. 11), sec. 69—Mining claim—Action by cestui que trust against trustee—Miner's right.]—A cestui que trust may bring an action against his trustee for the purpose of having the fulfilment of a trust

with respect to a mining claim enforced, although not the holder of a miner's right at the time when the right to the relief sought accrued. *McDougall v. Webster*, 2 W.W. & A'B. (L.), 164 (see MINER'S RIGHT, 10); and *Learmonth v. Morris*, 6 W.W. & A'B. (E.), 74 (see MINER'S RIGHT, 21), followed. *Theodore v. Theodore*, 8 Q.L.J., 78. *F.C., Griffith, C.J., and Cooper, J.* (1897).

Q.

6.—Trustees—Deed of partition—Parcels—General words—Intention of parties—Lease to coal company.]—See PARTITION.

7.—Trust deed—Giving priorities over subsequent encumbrances—Form of debentures—Company.]—See COMPANY, 404.

8.—Relation of trustee and cestui que trust—Enforcement of contract by third party—Mineral lease.]—See CONTRACT, 10.

## ULTRA VIRES

See COMPANY.

1.—Regulations—Ultra vires—Claim, personal working of—Goldfields Act (18 Vic. No. 37), sec. 3.]—Under a power to make regulations determining the conditions on which a claim may be worked, a rule declaring that no person shall be entitled to any interest in a claim who does not personally work therein, is valid. *Conway v. Rosnier and Chapman*, 1 V.L.T., 159. *Molesworth, J.* (1856).

V.

2.—Companies Act 1890 (Part II.), secs. 190, 191, 193—No-liability company—Sale of property by directors—Ultra vires—Winding up of company—Undertaking by directors to wind up.]—There is nothing inconsistent with Part II. of the *Companies Act* 1890 in the regulations of a no-liability company authorising the directors to sell a large portion or even the whole of the company's properties without a resolution for winding up the company having been first passed. *Quare*, whether the company could divide the profits resulting from such sale without going through the form of a voluntary liquidation. An undertaking by directors in an agreement to sell the property of the company to wind up the company with due expedition, and to obtain the consent of the liquidator to the agreement, although inoperative and void as beyond the

authority of the company, will not vitiate the whole agreement, and the particular clause containing such undertaking may be rejected as not part of the agreement. *Creswick Grand Trunk G.M. Co. Regd. v. Hassall*, 5 W.W. & A'B. (E.), 49, distinguished. *Ellson v. Ivanhoe G.M. Co.*, 3 A.L.R., 209. F.C., *Holroyd, Hodges and Hood, JJ.* (1897). And see COMPANY, 131, 301. V.

3.—Mining Statute 1865 (No. 291), secs. 71, 72, 73—Mining by-laws—Ultra vires.]—See BY-LAWS AND REGULATIONS, 27.

4.—Regulations—Mining Statute 1865, sec. 43.]—See BY-LAWS AND REGULATIONS, 28.

5.—Mining Act 1874—Regulation 95, December 29th, 1875—Holder of leasehold—Notice.]—See MINING ACT 1874, 2.

6.—Repealing Crown Leases—Scire facias.]—See LEASE, 70, 71, 72.

## UNALLOTTED SHARES

See COMPANY (SHARES).

## UNCERTAINTY

See BY-LAWS AND REGULATIONS.

## UNDERGROUND WORKINGS

Lessor and Lessee—Possession—Evidence of.]—See LEASE, 63.

## UNDIVIDED SHARE

See PARTNERSHIP ; PRACTICE (WARDEN).

## USER

See WATER.

## VALUATION

Railway—Underlying minerals—22 Vic. No. 19, sec. 45 (N.S.W.).]—See RAILWAY.

## VENTILATION

Coal Mines Regulation Act 1876, sec. 12, subsecs. 2, 3, 4 (N.S.W.)—"Working place"—Meaning of.]—See MINE, 8.

## VESTING ORDER

See PRACTICE (VESTING ORDER).

## VOTES

See COMPANY, XXIII.

## WAIVER

See COMPANY, 179, 278 ; PRACTICE, 47.

1.—Receipt of rent—Continuing forfeiture—Waiver.]—See FORFEITURE, 46.

2.—Waiver of rights—Priorities.]—See PRIORITIES, 3.

## WARDEN

See PRACTICE.

## WARRANT

See PRACTICE.

## WASH DIRT

See CRIMINAL LAW ; CROWN ; GOLD.

## WASTE LANDS

See CROWN LANDS.

## WATER

*See* LICENSE ; TAILINGS ; TAIL RACE.

1. — **Tail-race — Accumulation of sludge—Water-course.**—The holder of a claim had a tail-race, which after passing through his claim passed through the claim next below him. The occupier of the lower claim made a dam on his own claim across the race, which had the effect of allowing sludge to collect in the tail-race and of preventing the water from flowing away from the upper claim. The holder of the upper claim summoned the owner of the lower before the Warden under the Act No. 32, sec. 76, for unlawfully interfering with the tail-race. *Held*, that this was not a water-right within the meaning of sec. 76; that the complainant could not insist that the water should flow in its former course without any interference, or even in any course that would prevent the accumulation of sludge injurious to the working of his claim. *Schultz v. Dryburgh*, 2 W. & W. (L.), 224. Banco (1863). V.

2.—**Prior right of license.**—Where a miner held a water-right, known as a creek-right, under the Beechworth by-laws by virtue of his miner's right prior to the date of a license to divert water (under the Act No. 148, sec. 11) granted to another miner, it was *held* that he was not entitled to deprive the licensee of any portion of the quantity of water specified in such license when the natural supply was insufficient for both. *Nightingale v. Daly*, 3 W. W. & A'B. (M.), 7. *Molesworth, J.* (1866). V.

3.—**Right to water-shed — Dams.**—Where under the Act No. 32, sec. 3, a person erected a dam: *Held*, that the Act did not give him a right inconsistent with the common law to have the ownership of a water-shed over Crown lands from which the water would naturally flow to his dam, and which he could only get by the express grant of the Crown. The Act protects him in the ownership of the dam itself and against all direct injuries to the dam itself. *Stevens v. Webster*, 3 W. W. & A'B. (M.), 23. *Molesworth, J.* (1866). V.

4.—**User of stream—Mining Statute 1865, sec. 5—Miners' rights.**—In an action against miners for polluting a stream, which, after flowing through the Crown land occupied by defendants as a claim held under miners' rights, flowed

through the land of the plaintiff, the defendants pleaded that they were in legal occupation of Crown land, as holders of miners' rights, on which they were mining for gold, and for the purposes of their mining operations they used the said stream as they lawfully might, in consequence of which the stream was discoloured by the water so used, which was the grievance complained of. The plea was drawn in view of the *Mining Statute* 1865, sec. 5, which, *inter alia*, provides that the holder of a miner's right may "take or divert water from any spring, lake, pool, or stream situate or flowing through or adjoining Crown lands, and to use such water for mining for gold." The plaintiff demurred to this plea, on the ground that the facts therein alleged showed that the injury was caused by the defendants, and afforded no justification to plaintiff's cause of action, as it was incumbent on defendants to do the acts complained of in such a manner as not to injure the plaintiff. The Court held the plea bad, and gave judgment for the plaintiff. *Campbell v. Ah Chong*, 1 V.R. (L.), 25; 1 A.J.R., 35. Banco (1870). V.

5.—**Summons for diverting and abstracting water—Prospective injury—Trespass.**—Under a summons for "interfering with and trespassing on the complainant's right to divert and use for mining purposes certain water by abstracting and diverting the same," the Warden cannot go into the question of prospective injury to the complainant's rights or of trespass to the land occupied by the complainant's aqueduct. *Hyndman v. Micke*, 8 V.L.R. (M.), 39; 4 A.L.T., 84. *Molesworth, J.* (1882). V.

6.—**Mining Statute 1865 (No. 291), secs. 36, 101 (iii.), 177—Water right license—Jurisdiction of Warden.**—A Warden has jurisdiction under the *Mining Statute* 1865 (No. 291), sec. 101, sub-sec. 3, and sec. 177, to hear a complaint by the holder of a water right license for the diversion or abstraction of water from his source of supply. *Trahair v. Rocky Mountain Extended G.M. Sluicing Co.*, 11 V.L.R., 281. *Molesworth, J.* (1885). V.

6a.—**Riparian proprietor—Cesser of rights.**—A riparian proprietor loses his peculiar rights when his land ceases to be in contact with the flow of the stream. *Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co. Ltd.* *a'Beckett, J.*, Oct. 12th, 1897. V.

[NOTE.—See also *Lyon v. Fishmongers' Co.*, 1 App. Cas., 662, at p. 683.—*Per Lord Selborne.*]

**7.—Dam across running stream—Riparian rights.**—The erection of a dam by a riparian owner across a running stream cannot be lawful if it obstruct for one moment the flow of the entire stream to the other lands below. *Pring v. Marina*, 5 N.S.W.S.C.R. (L.), 390. *Stephen, C.J., Hargrave and Cheeke, JJ.* (1866).

N.S.W.

**8.—Flowing water—Rights of riparian owners—Mining Act 1874, sec. 15—Intermittent streams—Use of machinery.**—Declaration—(1.) That the defendant wrongfully erected a dam and other obstructions on a creek flowing through the plaintiff's run, and thereby interrupted and obstructed the flow of water of the said creek, and diverted the stream from its natural course, and prevented the water thereof from flowing into and through the plaintiff's run, whereby the plaintiff was deprived of the use of the water of the stream. (2.) That the defendant fouled and polluted the said creek and the water therein, and caused large quantities of mud, sludge and dirty water to be thrown and diverted into the said stream, whereby the said water became impure and unfit for domestic and other necessary purposes. Plea, that the plaintiff's run was Crown lands within the meaning of the *Mining Act* 1874, and the said creek flowed through Crown lands, and the defendant was the holder of a miner's right and of a water-right, issued in accordance with the said Act and the regulations thereunder; and whilst he was holder of the said miner's right and water-right the defendant cut, constructed and used certain water races for gold mining purposes through and upon the plaintiff's run, and took and diverted water from the said creek and used the same for gold mining and domestic purposes in such manner and in such quantity as provided for by the said Act and the regulations thereunder, which are the alleged trespasses. Held (on demurrer), that the plea is no answer to either count. The first count complains of an entire stoppage by the defendant of the flow of water in the creek. The second complains of a fouling of the water. The plaintiff, as riparian owner, is entitled to have an undiminished flow of water in its natural state, subject only to reasonable use by other proprietors. Neither at common law nor by

the *Mining Act* is the defendant justified in stopping the flow of running water or in fouling it. Judgment for the plaintiff. *Per Martin, C.J.*, at pp. 241-2:—"Decisions of American Courts on the rights of riparian owners are referred to in England as of very high authority." *Per Martin, C.J.* (after referring to *Carlyon v. Lovering*, 1 H. & N., 784; *Miner v. Gilmour*, 12 Moo. P.C., 131; *Mason v. Hill*, 5 B. & Ad., 1; *Embrey v. Owen*, 6 Ex., 353; *Hodgkinson v. Ennor*, 4 B. & S., 239; and *Chase-more v. Richards*, 7 H.L.C., 349), at p. 244:—"Now, all these cases show that a riparian proprietor has a right to have the water of a stream flowing through his land in an undiminished quantity and in its natural state, subject to a reasonable use of the same for purposes of irrigation, turning water wheels, watering cattle, and domestic use. But such use must be reasonable; it must not have the effect of depriving the persons lower down of the use of the streams. If in dry season the volume of water is diminished the stream cannot be used if the effect would be that people higher up would take all the water." *Per Martin, C.J.*, at p. 245:—"The Legislature did not intend to give to the holder of a miner's right the power to take the whole of the water of any stream." *Per Martin, C.J.*, at p. 245:—"I see no clause in this Act giving power to the owner of land to foul a stream, or for a Mining Board to pass regulations empowering a person to do so. On the contrary, there are regulations giving power to the Board to prevent that being done and to prevent injury being caused by holders of miner's rights." *Per Faucett, J.*, at p. 245:—"There may be some difference with respect to streams which are intermittent, or which are dry during some portions of the year." *Per Faucett, J.*, at p. 245:—"If the use of machinery has the effect of polluting the water of a stream such use must be discontinued. The mere user will not justify the pollution of the water." *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. *Martin, C.J., Faucett and Innes, JJ.* (1885). N.S.W.

**9.—Reservation for public purposes—Rights of Crown—Perpetuities—Nullum tempus occurrit regi.**—See *Cooper v. Stuart*, 7 N.S.W.L.R. (E.), 1 (1886); *Lord v. City Commissioners*, 12 Moo. P.C., 473. J.C. (reversing judgment of Court below). 7 N.S.W.L.R. (E.), 10 (1886).

N.S.W.

10.—**Crown lands—Reclamation of water frontage—Promise of a grant—Right of access to water.**—*See Day v. Brunker*, 12 N.S.W.L.R. (E.), 157. *Owen, J.* (1891). N.S.W.

11.—**Water—Right to flowing—Surface water and storm water—Right to reeds on neighbour's land to serve as a filter—Loss of water in natural stream by underground percolation.**—The owner of a reservoir, which is fed by a natural stream, is entitled to damages for the loss of water in the stream through percolation, caused by the drainage of a neighbour's swamp, through which the stream runs. The owner of a reservoir is not entitled to damages for the removal from a neighbour's land of reeds, rushes and water grass, which served as a filter for, and rendered pure the water in a natural stream flowing through them into his reservoir. The owner of a reservoir has no right to damages for the removal from a neighbour's land of surface water lying upon a swamp which served to dilute and render pure the water flowing along a natural stream through the swamp into his reservoir. The owner of a reservoir has no right to damages for the removal of surface or storm water on a neighbour's land, before it has reached a defined and natural channel, although from the natural level of the land such water, if unimpeded, would have flowed into his reservoir. *Macnamara v. Minister for Works*, 15 N.S.W.L.R. (E), 173. *Owen, J.* (1894). N.S.W.

12.—**Riparian rights—Overflow.**—The right has long been established to water flowing in a well-defined channel of a stream. Every riparian proprietor, "including those who have subordinate interests under proprietors such as tenants, has a free right to the water in the channel of a stream which is well defined. They are entitled by natural right to the water in such channel, subject only to such use of water in passing as every other riparian proprietor is entitled to, with respect to the water which passes his land; but all other water, whether it be water that flows over the banks of the channel, water collected in swamps, or water which is without defined or recognised channel, no one has any right to whatever."—*Per Owen, J. Macnamara v. Minister of Works*, 15 N.S.W.L.R. (E.), 173, at p. 187 (1894). N.S.W.

13.—**Goldfields Act (Q.), 1874 (38 Vic. No. 11), secs. 9, 62-64—Regulations 30, 60-72—Miner's**

**right—Water rights—Gold mining lease—Right to subsoil.**—The holders of miners' rights being registered as proprietors of certain areas, called water rights, and being in occupation and having performed all conditions, objected to a lease being granted for mining purposes, comprising part of their water rights, and claimed an injunction. *Held*, that assuming the facts stated, the defendant was entitled to mine under the surface occupied by the plaintiffs as water rights. *Hall v. Gorrie*, 3 Q.L.J., 113. F.C., *Lilley, C.J., Harding and Mein, JJ.* (1888). Q.

14.—**Watercourse—Injury to.**—Right to recover damages for an alleged improper interference with a watercourse depends upon the question whether in fact the plaintiffs lawful and reasonable enjoyment of the water has been sensibly affected by the act of the defendant, and this is entirely a question of fact for the jury. *Dunn v. Collins*, 1 S.A.L.R., 126. *Hanson, C.J., Gwynne and Wearing, JJ.* Common Law (1867). S.A.

15.—**Watercourse—Injury to—General law relating to—Mines.**—“The subject matter of this action is obviously of very great importance to the people of this province. . . . Hereafter also the question may assume a special interest to the proprietors of the mines in cases where subterranean water channels may happen to be cut in the progress of mining operations. For these reasons it has been considered fitting that in delivering judgment the law relating to watercourses should be declared by the Court.”—*Per Wearing, J.*, at p. 135. *Dunn v. Collins*, 1 S.A.L.R., 126 (1867). S.A.

16.—**Riparian rights—Mistrial—New trial.**—*See White v. Corporation of Adelaide*, 17 S.A.L.R., 50 (1883), and decision of Privy Council, 17 S.A.L.R., 61 (1886). S.A.

17.—**Making a race—“Mining purpose.”**—*Per Chapman, J.*:—“In Victoria, where the subject has often been considered, it has always been held that the making of a race is a ‘mining purpose’ within the meaning of the Acts from which all our [i.e. the New Zealand] Mining Acts are more or less borrowed.” *Robinson v. Blundell*, Mac. 683 at pp. 690, 691 (1867-8). N.Z.

18.—**Riparian rights.**—The common law respecting the rights of riparian proprietors is applicable to the colonies. *Borton v. Hove*, 3

N.Z.C.A., 5; 2 N.Z.J.R., 97. *Johnston, Richmond and Chapman, JJ.* (1875). N.Z.

19. — **Riparian rights — How common law affected by N.Z. Goldfields Act 1866 (30 Vic. No. 32), sec. 6—Pollution of streams.]**—The common law rights of riparian proprietors are so far abridged by the provisions of the *Goldfields Act* 1866 (30 Vic. No. 32), sec. 6, as to give the holders of miners' rights the power to take, divert, and use the water of streams on private lands, subject to regulations made under the Act, but the miners are not entitled to return the water into the stream in a polluted state. *Ibid.* N.Z.

20. — **Pollution of streams — Right of freeholder to bring actions.]**—A freeholder may maintain an action for polluting water flowing through or past his freehold unless it be within a proclaimed goldfield and the pollution be justified by statutory regulation. *Ibid.* N.Z.

21.—**Pollution of streams—Action by freeholder—Date of purchase of freehold.]**—In an action by a freeholder for pollution of water running through or past his freehold, it is unimportant, in the absence of prescription or grant of an easement, whether the freeholder bought his land before or after the proclamation of a goldfield. *Ibid.* N.Z.

22.—**Right of freeholder to use of pure water.]**—There is no distinction as to use of pure water between the rights of a freeholder possessing land on one or both sides of a stream. *Ibid.* N.Z.

23.—**Riparian rights—Ownership of soil usque ad medium flum aquæ.]**—*Semble*, that in New Zealand the riparian freeholder on each side of a stream is entitled to the soil *usque ad medium flum aquæ*. *Ibid.* N.Z.

24.—**Riparian rights—Damages for pollution of stream.]**—The nature and extent of a riparian proprietor's interest in the land affect only the question of damages in an action for pollution of the water of the stream. *Ibid.* N.Z.

25.—**Riparian rights—Pollution of streams—Measure of damages.]**—Any unjustified fouling of a stream is ground for damages at all events nominal. It is no bar to the recovery of damages to show that, without the pollution caused by the defendants, the water was sufficiently polluted by others to render it useless to the plaintiffs. *Crossley v. Lightowler*, L.R. 3 Eq.,

279; 2 Ch. 478, followed. *Semble*, if the acts of the defendants were sufficient to create the whole damage suffered by the plaintiffs, they may be liable for the whole. *Ibid.* N.Z.

26. — **Head race — Rights of holders.]**—The holders of a head race for mining purposes are entitled to have the water in its natural condition at the point whence they are authorised to divert it. *Guffie v. Christian*, 1 N.Z.J.R. (N.S.) S.C., 96. N.Z.

[NOTE.—But see now *Mining Act* 1891 (N.Z.), (54 & 55 Vic. No. 33), secs. 103, 150-156.]

27. — **Water for general use — Exception to grant.]**—A regulation providing that "two sluice heads of water shall, if required, be at all times allowed to flow in the natural course of any stream for general use," is in the nature of an exception to the original grant, and any licensee may be required to return water to the creek, notwithstanding his license, if it be proved that the water is required for "general use." *McLean v. Scott*, 1 N.Z.J.R. (N.S.) M.L., 3. N.Z.

28.—**Riparian rights—Action for interference with—Title.]**—In an action by a mill-owner residing on a goldfield against another mill-owner for interference with his riparian rights, plaintiff showed an equitable title to the land on which the mill was erected, but did not hold an agricultural lease or business license or miner's right. *Held*, that he had sufficient title to maintain the action. *Gilmour v. Batel*, 1 N.Z.J.R. (N.S.) M.L., 23. N.Z.

29.—**Water right—Failure to construct race—Forfeiture.]**—*Semble*, that neglect to construct a water race does not entail forfeiture so long as the water right is used for mining purposes. *Frater v. Howe*, 1 N.Z.J.R. (N.S.) M.L., 30. N.Z.

30.—**Water right—Non-user—Failure to construct race—Forfeiture.]**—On a complaint in the Warden's Court claiming an adjudication of forfeiture against defendant in respect of a certain water right, on the ground that he had neglected for twelve months to cut and construct his water race, it appeared that the defendant had purchased two water rights, the previous owner of which had constructed a race for the other, the whole of the water being turned into the race already constructed. The Warden decreed forfeiture. *Held*—(1.) That as it was competent for the defendant to have applied to the Warden

for permission to shift one water right into the race constructed for the other, and for the Warden to grant such permission, the neglect to do so should not be visited with forfeiture but with a fine; but (2.) Although a forfeiture had been incurred by the non-user of the water, yet as the defendant had shown that he had expended large sums of money in work connected with the rights held by him, and that plaintiff had been allowed to use the water, a fine should be imposed in lieu of forfeiture. *Ibid.* N.Z.

**31.—Right to divert water—Raising level of water.]—**A right to divert a river is not a right to erect a dam, and thereby raise the level of the water. *Ah Mon v. Bradfield*, 1 N.Z.J.R. (N.S.) M.L., 44. N.Z.

**32.—Right of claim-holders to compensation for damages by construction of a tail-race passing through the bounds of their race—Right to deposit forkings on the bounds of a race.]—***See Bohning v. Carroll*, 1 N.Z.J.R. (N.S.) M.L., 47. N.Z.

**33.—Riparian rights—Pollution of streams.]—**Persons lawfully engaged in mining have no right to foul the water or raise the bed of a stream to the injury of the riparian proprietors. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97, followed. *Costello v. O'Donnell*, N.Z.L.R. 1 C.A., 105. C.A., *Prendergast, C.J.*, and *Richmond, J.* (1882). N.Z.

**34.—Abandonment of water-race—Merger in freehold.]—**A water-race which runs through private property when abandoned merges in the freehold, discharged from all rights of user for mining purposes; and if any person desires to use it as a water-race he must take the same steps to acquire it as if he were about to cut a new race. *Reg. v. Keddel*, N.Z.L.R. 1 S.C., 185. *Williams, J.* (1882). N.Z.

**35.—Water-race—Extinguishment of right in.]—**The rights of a grantee of a water-race on the goldfields are analogous to easements, and the extinguishment of such rights in whole or in part are to be determined on the same principles which apply to the extinguishment of easements. *Chin Fan v. Davis*, 11 N.Z.L.R., 396. *Williams, J.* (1892). N.Z.

**36.—Water-race—Abandonment in fact of part—Jurisdiction of Warden to restrain interference.]—**Where abandonment in fact of part of a

water-race granted prior to the *Mining Act 1886* (N.Z.) is proved, the Warden, whether he has or has not jurisdiction to decree forfeiture, has power to restrain interference with the possession of a subsequent grantee of the abandoned part of the race. *Ibid.* N.Z.

**37.—Riparian rights—Action for fouling stream—Mining Act 1886 (N.Z.), (50 Vic. No. 51), sec. 154—Proclamation of sludge channel.]—**Where, under sec. 154 of the *Mining Act 1886*, the Governor proclaims any river a sludge-channel, the Crown is liable only for injury caused by the foul water, tailings and mining debris suffered to flow into the river from the time when the proclamation takes effect. Apart from prescription and the provisions of the above section the act of fouling the water of a river or discharging tailings or mining debris into it is unlawful, and gives an immediate right of action to the owner of riparian rights injuriously affected thereby. Where any such right of action has accrued before the time appointed for the proclamation taking effect it is not in any way affected by the proclamation. *Borton v. Minister of Mines*, 12 N.Z.L.R., 217. *Williams, J.* (1892). N.Z.

**38.—Acquiescence—Pollution of stream.]—**The law as to acquiescence and statutory right to foul a stream to the detriment of lower riparian owners as laid down in *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97, has not been altered by subsequent legislation. *McIndoe v. Julland Flat (Waipori), G.M. Co.*, 12 N.Z.L.R., 226. *Williams, J.* (1892-3), (affirmed by C.A., *Prendergast, C.J.*, *Richmond and Conolly, J.J.*) (1895), 14 N.Z.L.R., 99. N.Z.

**39.—Pollution of stream—"Ordinary use."]—**The use for mining purposes involving fouling of the water of a river, flowing to a settled farming district where it may be required for domestic purposes, is not an "ordinary use" within *Miner v. Gilmour*, 12 Moo. P.C.C., 131, 156, and *Ormerod v. Todmorden Joint Stock Mill Co.*, 52 L.J.Q.B., 445, 450. *Ibid.* N.Z.

**40.—Prescriptive right to foul stream.]—**Those who set up a prescriptive right to foul a stream must show that they have exercised it substantially to the extent claimed during the whole period of twenty years preceding the action. If during a substantial part of the



period they have fouled to a less extent they can only prescribe to that extent. *Ibid.* N.Z.

41.—Pollution of stream—Defence of prescription.]—The defendants claimed a prescriptive right to foul a stream with silt caused by gold mining operations, basing their claim on the fact that a goldfield or mining district had existed for more than twenty years, bounded by the watershed of the stream, and that during the whole period miners working under titles derived from the Crown in different parts of the district had similarly fouled the stream, and alleged that the Crown had thereby acquired an easement by prescription. *Held*, that the defence could not succeed because such a district, not being in any sense occupied as a tenement for mining purposes, could not be a dominant tenement, though any claim within it might become such. *Ibid.* N.Z.

42.—Rights of riparian owners as to the use of water—Diversion of water—47 Vic. No. 10, sec. 47—Effect of other riparian proprietors diverting water.]—See *Derry Tin M. Co. v. South Garibaldi Tin M. Co.*, 11 A.L.T., 115. *Dobson, C.J.* (1889). T.

43.—Drainage of Mines Act 1877, sec. 3—Order for contribution.]—See DRAINAGE.

44.—Water—Pollution of.]—See CROWN, 11.

45.—Water-right—Non-user—Abandoned race—Water used for other than mining purposes—Forfeiture.]—See FORFEITURE, 64.

46.—Action for fouling stream—Joint tortfeasors—Parties.]—See PRACTICE, 302.

47.—Water—Deprivation of—Damages.]—See DAMAGES, 6.

48.—Water right—Exchange license—Priorities.]—See LICENSE, 22.

## WATER LICENSE

See LICENSE.

## WATER RACE LICENSE

See LICENSE.

## WEIGHTS

Weighing gold—Keeping false weights—Comparison with weights used in Gold Office—Test—Standard weights—Evidence.]—See *Reg. v. Wiegert*, 1 V.L.T., 220. *a'Beckett, C.J., Barry and Williams, J.J.* (1856). V.

## WINDING UP

See COMPANY.

## WITNESS

Taxation of costs—Allowance for scientific witnesses qualifying themselves.]—See PRACTICE, 114.

## WORDS

1.—Mining Companies Act 1871 (No. 409), sec. 118, sub-sec. 5—"Absolutely forfeited."]—See COMPANY, 213.

2.—"Accident"—Mines Regulation Act 1889, secs. 15, 18 (Q.)—Right to recover compensation.]—See NEGLIGENCE, 4.

3.—"Authorised persons"—Goldfields Act—Chinese alien—Miner's right.]—See *Ex parte Ah Tchin*, 3 N.S.W.S.C.R. (L.), 226. *Stephen, C.J., and Milford, J. (Wise, J., diss.)*, (1884).

4.—"Board."—See COMPANY, 72.

5.—Mining Companies Act 1871 (No. 409), sec. 38—"Book of account."]—A minute book containing minutes of the proceedings of the directors of a mining company, and including the accounts of the company as presented to them and passed for payment, is not a "book of account" open to the inspection of a shareholder under sec. 38 of the *Mining Companies Act* 1871 (No. 409). *James v. Thomson*, 10 V.L.R. (L.), 125; 6 A.L.T., 12. *Williams and Holroyd, J.J.* (1884). V.

6.—Goldfields Act 1866 (N.Z.), (30 Vic. No. 32) —"Business."]—The business carried on by a mining agent on the goldfields is not a "business" within the meaning of the *Goldfields Act*

1866 (30 Vic. No. 32). *Inspector of Licenses v. Enright*, 1 N.Z.J.R. (N.S.) M.L., 28. N.Z.

7.—“Cancelled and a new grant given.”—See POSSESSION, 4.

8.—“Claim.”—See CLAIM.

9.—Conditions “annexed by law to the estate or interest of a conditional purchaser”—Crown Lands Alienation Act 1875, sec. 7.]—See CROWN LANDS, 11.

10.—“Context”—48 Vic. No. 18, sec. 4.]—See CROWN LANDS, 17.

11.—Contributory—Who is.]—See COMPANY, 388.

12.—“Crown lands”—48 Vic. No. 18, secs. 80, 86.]—See CROWN LANDS, 17.

13.—“Elective body corporate.”—See COMPANY, 80.

14.—Mines Act 1890 (No. 1120), sec. 366—“Employed in or about a mine.”—The words in sec. 366 of the *Mines Act* 1890 (No. 1120), “employed in or about a mine,” include the period during which a miner is lawfully going to or coming from his work at the proper times. *O’Driscoll v. North Duke Co.*, 17 A.L.T., 64; 1 A.L.R., 94. *Holroyd, J.* (1895). V.

15.—Holder.]—See BY-LAWS AND REGULATIONS, 23.

16.—Companies Act 1890 (No. 1074), sec. 303—“In debt.”—See COMPANY, 364.

17.—“Interval of not less than 14 days.”—See COMPANY, 108.

18.—“Issued.”—See COMPANY, 372.

19.—“Lands, mines, minerals and royalties.”—See *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas., 295, at pp. 304-5.

19a.—“Land under lease for mining purposes”—Crown Lands Alienation Act 1861, sec. 13.]—See CROWN LANDS, 13.

20.—“Legal manager.”—See COMPANY, 95.

21.—“Mine”—Goldfields Act 1852, sec. 34—Act of 1867—Construction.]—See CRIMINAL LAW, 5.

22.—Local Government Act 1874 (No. 506),

sec. 253—“Mines”—Meaning of.]—See MUNICIPALITIES, 10.

23.—“Mining purpose”—Making of race.]—See WATER, 17.

24.—“Mining purposes”—Power of no-liability company to sell mine—44 Vic. No. 23.]—See COMPANY, 131, 301; ULTRA VIRES.

25.—“Mining surveyor or experienced miner”—39 Vic. No. 31, sec. 38.]—See COAL, 1.

26.—“Occupier”—Right to mine—Rating.]—See MUNICIPALITIES, 16.

27.—“Ore”—7 & 8 Geo. IV. c. 29, sec. 37—Larceny of—Definition of word—Wash-dirt.]—*Per Martin, O.J.*, at pp. 266-8; *per Hargrave, J.*, at pp. 273-6; *per Faucett, J.*, at p. 281. *Reg. v. Wilson*, 12 N.S.W.S.C.R. (L.), 258 (1874). N.S.W.

28.—“Person”—3 & 4 Wm. IV. c. 27, sec. 1—Crown—Possessory title against.]—See CROWN LANDS, 7.

29.]—“Person” does not include corporation in sec. 13 of *Crown Lands Alienation Act* 1861. See PRACTICE (SCIRE FACIAS). N.S.W.

30.—“Person”—Corporation—Masters and Servants Act.]—See EMPLOYER AND EMPLOYEE, 4.

31.—“Person employed”—Tributer—Mining Act 1886 (N.Z.), (50 Vic. No. 51), sec. 217.]—See COMPENSATION, 11.

32.—Police Offences Act 1890 (No. 1126), sec. 41, sub-sec. 11—“Person found in or upon any mine.”—In sec. 41, sub-sec. 11, of the *Police Offences Act* 1890 (No. 1126), the words “any person found, &c., in or upon any mine, &c.,” mean any person against whom there is any evidence of his being or having been in or upon any mine, &c. *Uren v. Rosewarne*, 15 A.L.T., 36. F.C., *Williams, Holroyd and Hood, JJ.* (1893). V.

33.—“Personal representatives”—Mines Regulation Act 1889, sec. 28 (Q.)—Person killed in a mine—Right to recover compensation—Person entitled to sue.]—See NEGLIGENCE, 4.

34.—Mines Act 1890 (No. 1120), sec. 3—“Place.”—In sec. 3 of the *Mines Act* 1890 (No. 1120) in the definition of the word “mine” the word “place” is not limited by the words which follow it, but is to be interpreted according to

its ordinary signification. *Uren v. Rosewarne*, 15 A.L.T., 36. F.C., *Williams, Holroyd and Hood, J.J.* (1893). V.

35.—Regulation of Mines and Mining Machinery Act 1883 (No. 783), secs. 8 (xxix.), 16—"Platforms."—See PLATFORMS.

36.—"Prescribed conditions."—See CLAIM, 38.

37.—"Promoter"—Mining Partnership Act.] See COMPANY, 95.

38.—"Property"—Power to mortgage "assets."—See COMPANY, 30, 33.

39.—"Property."—See COMPANY, 30-33.

40.—"Proxy."—See PARTNERSHIP, 24.

41.—"Realised profits."—See COMPANY, 3.

42.—Dispute "regarding" partnership—Goldfields Act 1866, sec. 22—Costs.]—See PRACTICE, 119.

43.—"Re-hearing"—Mining Act 1874, sec. 109—Warden.]—See MINER'S RIGHT, 37.

44.—"Resolutions"—Companies Act 1864—Articles of association.]—See COMPANY, 6.

45.—"Revert"—Crown Lands Alienation Act 1861, sec. 18—Mineral conditional purchase—Declaration of forfeiture by Crown necessary.]—See CROWN LANDS, 10.

46.—"Royalties."—See *Attorney-General of Ontario v. Mercer*, 8 App. Cas., 767; and see *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas., 295, at pp. 304-5.

46a.—"Shall"—Tasmanian Mineral Lands Act 1877 (41 Vic. No. 7) — Regulations of June, 1882.]—See *Maa Mon Chin v. Hortin*, 7 A.L.T., 85. *Dobson, A.C.J.*, and *Wrenfordsley, J.* (1885). T.

46b.—"Span"—Statutory contract — Words whether used in technical or ordinary sense.]—See STATUTES, 4.

47.—"Stock"—"Shares."—See PRACTICE, 385a.

48.—"Syndicate."—See PARTNERSHIP, 21.

49.—"Unoccupied" land — Proclamation — Land occupied becoming unoccupied—37 Vic. No. 13, sec. 26.]—See MINING ACT 1874, 3.

50.—"Until and unless"—Trespass—Miner's right—Mining lease—Regulations 28 and 33—Mining Act 1874, sec. 40.]—See LEASE, 57.

51.—Mines Act 1890 (No. 1120), sec. 265—Application to state special case—Meaning of words "upon the hearing."—See PRACTICE, 373.

52.—"Working place"—Coal Mines Regulation Act 1876, sec. 12, sub-secs. 2, 3, 4—Ventilation of mine.]—See MINE, 8.

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## WORK

See FORFEITURE.

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## WORKINGS

Working mine by "in stroke" from adjoining property—Construction of lease.]—See LEASE, 55.

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## WORKMAN

See EMPLOYER AND EMPLOYEE.

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## WRONG-DOER

See TRESPASS.



# CASES

FOLLOWED, NOT FOLLOWED, APPROVED, OVER-RULED, QUESTIONED,  
EXPLAINED, DISTINGUISHED, AND COMMENTED UPON.

**Aarons, O'Sullivan v.**, 5 N.S.W.S.C.R. (L.), 353 (1866), distinguished. *Haughey v. Deane*, 10 N.S.W.S.C.R. (L.), 264. F.C. (1871).

**Abrey v. Crux**, L.R. 5 C.P., 43 (1869), followed. *Frazer v. Hayes*, 6 N.S.W.W.N., 110. (1889).

**Alexander v. Simpson**, 43 Ch. D., 139 (1889), distinguished. *In re Katoomba Coal and Shale Co. (North's Case)*, 13 N.S.W.L.R. (E.), 70 (1892).

**Annabella G.M. Co., Nolan v.**, 6 W.W. & A'B. (M.), 38 (1869), explained. *Costerfield Co. v. Shaw*, 1 V.R. (M.), 7; 1 A.J.R., 17 (1870).

**Armstrong, Shotover Terrace G.M. Co. v.**, 1 N.Z.J.R. (N.S.) S.C., 95, dictum of *Williams, J.*, not followed. *Seaton v. Lloyd*, 3 N.Z.J.R. (N.S.) S.C., 107.

**Astley U.G.M. Co. v. Cosmopolitan G.M. Co.**, 4 W.W. & A'B. (E.), 96 (1867), affirmed. *Woolley v. Ironstone Hill Lead G.M. Co.*, 1 V.L.R. (E.), 237 (1875).

**Attorney-General of British Columbia v. Attorney-General of Canada**, 14 App. Cas. 295 (1888-9), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Attorney-General v. Boyd**, 4 A.J.R., 103 (1873), distinguished. *Brain v. McColl*, 5 A.J.R., 17 (1874).

**Attorney-General v. Cooper**, 7 N.S.W.L.R.

(L.), 15; 2 W.N., 59 (1886), followed. *Attorney-General v. Boyle*, 14 N.S.W.L.R. (L.), 424; 10 W.N., 67. Banco (1893).

**Attorney-General v. Gee**, 2 W. & W. (E.), 122 (1863), distinguished. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.), 164 (1868).

**Attorney-General v. Morgan** (1891), 1 Ch., 432 followed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Attorney-General, Plant v.**, 5 Q.L.J., 57 (1893), over-ruled. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (*Harding, J., diss.*), (1894).

**Attorney-General, Woolley v.**, 2 App. Cas., 163 (1877), followed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Baddeley v. Earl Granville**, 19 Q.B.D., 423 (1887), distinguished. *Shanahan v. Taranganba Proprietary G.M. Co.*, 3 Q.L.J., 147 (1899).

**Ballarat v. Bungaree Road Board**, 1 V.R. (E.), 57; 1 A.J.R., 49 (1870), followed. *Attorney-General v. Rogers*, 1 V.R. (E.), 132; 1 A.J.R., 120 (1870); *Sandhurst v. Graham*, 3 A.J.R., 79. Banco (1872).

**Barbour, Ricketson v.**, Knox, 72 (1877), dictum in disapproved. *Ex parte Penniment*, 12 N.S.W. L.R. (L.), 68; 7 W.N., 129. F.C. (1891).

**Barker's G.M. Co. v. Keating**, 1 V.R. (M.), 18

(1870), considered. *Fraser v. Hartley*, 7 N.S.W. W.N., 101 (1891).

*Bates, Jones v.*, 12 N.S.W.S.C.R. (L.), 284 (1874), followed. *Siddons v. N.S.W. Shale and Oil Co.*, 12 N.S.W.S.C.R. (L.), 364. F.C. (1874).

*Bellamy v. Hopkins*, 19 V.L.R., 34 (1893), approved. *Moe Coal M. Co. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C. (1894).

*Berndston, Ward v.*, 8 N.Z.L.R., 21 (1889). See *Wellington City Council v. Stains*, 10 N.Z. L.R., 329. C.A. (1891).

*Blakeaway, Steward v.*, L.R. 6 Eq., 479; 4 Ch., 603 (1868-9), approved. *Meyenberg v. Pattison*, 3 Q.L.J., 184. F.C. (1889).

*Bonang G.M. Co., In re*, 4 N.S.W.B.C., 47 (1894), distinguished. *Gundagai v. Norton*, 15 N.S.W.L.R. (L.), 459; 11 W.N., 91. F.C. (1894).

*Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97 (1875), followed. *Costello v. O'Donnell*, N.Z. L.R. 1 C.A., 105. C.A. (1882). Effect of considered. *M'Indoe v. Juland Flat (Waipori) G.M. Co.*, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

*Bourke v. Wright*, 3 N.S.W.L.R. (L.), 145 (1882), explained. *Bourke v. Lucas*, 3 N.S.W. L.R. (L.), 217. Banco (1882).

*Bowman, Farran v.*, 1 W. & W. (L.), 150 (1862), distinguished. *Maconochie v. Woods*, 2 W. & W. (L.), 250. Banco (1863).

*Boyd, Attorney-General v.*, 4 A.J.R., 103 (1873), distinguished. *Brain v. McColl*, 5 A.J.R., 17 (1874).

*Brewer, Reg. v.*, 4 W.W. & A'B. (L.), 124 (1867), over-ruled. *Moore v. White*, 4 A.J.R., 17 (1873).

*Brisbane Oyster Fishery Co. v. Emerson, Knox*, 80 (1877), followed. *Smith v. Campbell*, 7 N.S.W. W.N., 10 (1890).

*Briscoe, Hawkins' Hill G.M. Co. v.*, 8 N.S.W. L.R. (E.), 123 (1887), distinguished. *South Burrangong G.M. Co. v. Gough*, 15 N.S.W.L.R. (E.), 113; 11 W.N., 52 (1894).

*British Columbia, Attorney-General of v. Attorney-General of Canada*, 14 App. Cas., 295 (1888-9), discussed. *Plant v. Attorney-General*, 5

Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

*Broadbent v. Marshall*, 2 W. & W. (E.), 115 (1863), applied. *Astley G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.), 96 (1867), affirmed. *Woolley v. Ironstone Hill Lead G.M. Co.*, 1 V.L.R. (E.), 237 (1875).

*Brough v. Homfray*, L.R. 3 Q.B., 771 (1868), considered. *Ex parte Ross*, 17 N.S.W.L.R. (L.), 212; 13 W.N., 3. Banco (1896).

*Brown v. Patterson*, 4 N.S.W.L.R. (E.), 1 (1883), followed. *Stockton Coal Co. v. Fletcher*, 5 N.S.W.W.N., 29. F.C. (1888).

*Bucknell v. Vickery*, 5 N.S.W.L.R. (E.), 81 (1884), followed. *Stockton Coal Co. v. Fletcher*, 5 N.S.W.W.N., 29. F.C. (1888).

*Buller's Case*, unreported, followed. *Elmslie v. Mackay*, *Brisbane Courier*, 6th March, 1890. F.C.

*Bungaree Road Board, Ballarat v.*, 1 V.R. (E.), 57; 1 A.J.R., 49 (1870), followed. *Attorney-General v. Rogers*, 1 V.R. (E.), 132; 1 A.J.R., 120 (1870); *Sandhurst v. Graham*, 3 A.J.R., 79. Banco (1872).

*Burton, Landry v.*, A.R., 28th June, 1862, considered. *Warrior G.M. Co. v. Kohinoor G.M. Co.*, 3 W. W. & A'B. (M.), 90 (1866).

*Caddick v. Skidmore*, 2 De G. & J. 52 (1857), distinguished. *Kennedy v. Currie*, 17 N.S.W. L.R. (E.), 28; 12 W.N., 105 (1896).

*Canada, Attorney-General of, Attorney-General of British Columbia v.*, 14 App. Cas., 295 (1888-9), discussed. *Plant v. Agent-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

*Carlyon v. Lovering*, 1 H. & N., 784 (1857), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

*Case of Mines (Queen v. Earl of Northumberland)*, 1 Plowd., 310, 336 (1568), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

*Cawlay v. Ling*, 6 W. W. & A'B. (M.), 12 (1869), followed. *Milne v. Morell*, 3 A.J.R., 21 (1872).

*Chasemore v. Richards*, 7 H.L.C., 349 (1859),

considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

*Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.), 31 (1867), applied. *Great North-West Co. v. Menhennet*, 4 W.W. & A'B. (M.), 63 (1867).

*Clarence United Co. v. Goldsmith*, 8 V.L.R. (M.), 14; 3 A.L.T., 147 (1882), distinguished by *Wrenfordsley, J.*, in *Maa Mon Chin v. Hortin*, 7 A.L.T., 85. F.C., Tasmania (1885).

*Clarke v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 976 (1888), in part over-ruled. *McDougall v. Moonlight Extended Q.M. Co.*, 14 V.L.R., 987. F.C. (1888).

*Clarke, Reg. v.*, 7 Moo. P.C., 77 (1849-51), commented on and explained. *Reg. v. Hughes*, L.R. 1 P.C., 81. J.C. (1865-6).

*Cleft in the Rock G.M. Co., McKean v.*, 5 W.W. & A'B. (L.), 42 (1868), considered. *Commercial Bank v. McDonald*, 2 A.J.R., 120. Banco (1871).

*Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867), examined. *O'Sullivan v. Clarke*, A.R., 2nd Dec., 1868.

*Clow, Reg. v.*, ex parte *Oliver*, 5 W.W. & A'B. (L.), 89 (1868), considered. *Reg. v. Heron*, ex parte *Bryer*, 2 V.R. (L.), 155; 2 A.J.R., 110. Banco (1871).

*Coates, Park Gate Iron Co. v.*, L.R. 5 C.P., 634 (1870), followed. *Conway v. Louchard*, 10 V.L.R. (M.), 6; 6 A.L.T., 120 (1884).

*Cobham, Wakeham v.*, 1 A.J.R., 93 (1870), applied. *Reg. v. Dowling*, ex parte *McLean*, 2 A.J.R., 56, Banco (1871), not followed. *Wilkinson v. Harris*, 9 N.S.W.L.R. (L.), 70; 4 W.N., 159. F.C. (1888).

*Collingwood Q.M. Co., Re*, 5 W.W. & A'B. (E.), 190 (1868), not followed. *In re Brown's Creek G.M. Co.*, 14 N.S.W.L.R. (E.), 24 (1892). See also *In re Grand United G.M. Co.*, 10 N.S.W.L.R. (E.), 209; 6 W.N., 106. F.C. (1889).

*Collins v. Hayes*, 6 W.W. & A'B. (M.), 5 (1869), followed. *Hunter v. McNulty*, 18 V.L.R., 416; 9 A.L.T., 33 (1887), approved. *In re Bull's Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242; 6 B.C., 63 (1896).

*Colonial Bank v. Whinney*, 11 App. Cas., 426 (1886), approved. *Re Keith*, ex parte *Joss*, 7 N.S.W.B.C., 75 (1897).

*Colonial Ice Co., Selfe v.*, 10 N.S.W.W.N., 153 (1894), distinguished. *South Burrangong G.M. Co. v. Gough*, 15 N.S.W.L.R. (E.), 113; 11 W.N., 52 (1894).

*Cooper, Reg. v.*, 7 N.S.W.L.R. (L.), 15; 2 W.N., 59 (sub nom. *Attorney-General v. Cooper*), (1886), followed. *Attorney-General v. Boyle*, 14 N.S.W.L.R. (L.), 424; 10 W.N., 67. Banco (1893).

*Cosmopolitan G.M. Co., Astley U.G.M. Co. v.*, 4 W.W. & A'B. (E.), 96 (1867), affirmed. *Woolley v. Ironstone Hill Lead G.M. Co.*, 1 V.L.R. (E.), 237 (1875).

*Costin, Lang v.*, *Molesworth, J.*, unreported, 24th Sept., 1878, followed. *Baker v. Wong Pang*, 8 V.L.R. (M.), 28; 4 A.L.T., 28 (1882).

*Costin, Reg. v. Thompson*, ex parte, 4 V.L.R. (L.), 512 (1878), distinguished and explained. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174 (1887), discussed. *Hancock v. Vanderstoel*, 17 V.L.R., 671. F.C. (1891).

*Creswick Grand Trunk G.M. Co. v. Hassall*, 5 W.W. & A'B. (E.), 49 (1868), distinguished. *Ellson v. Ivanhoe G.M. Co.*, 3 A.L.R., 209. F.C. (1897).

*Cribb, Reg. v.*, 2 Q.L.J., 157 (1886), approved. *Williams v. Morgan*, 13 App. Cas., 239. J.C. (1888).

*Critchley v. Graham*, 2 W. & W. (L.), 211 (1863), distinguished. *Re Drummond*, ex parte *Dunbar*, 2 W. & W. (L.), 280, Banco (1863), considered. *Coles v. Sparta*, 3 W.W. & A'B. (M.), 22 (1866); *Warrior G.M. Co. v. Kohinoor G.M. Co.*, 3 W.W. & A'B. (M.), 90 (1866); *Barlow v. Hayes*, 4 W.W. & A'B. (M.), 71 (1867), applied. *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.), 30 (1868); *Durant v. Jackson*, 1 V.L.R. (M.), 6 (1875), distinguished. *Antony v. Dillon*, 15 V.L.R., 240; 10 A.L.T., 231 (1889), considered. *O'Rorke v. Vallancourt*, 1 V.R. (M.), 43; 1 A.J.R., 158 (1870); *Vivian v. Dennis*, 3 W.W. & A'B. (M.), 34 (1866), distinguished. *Cruise v. Crowley*, 5 W.W. & A'B. (M.), 27 (1868), approved. *Woodward v. Earle*, 2 N.Z.J.R., 12 (1874).

**Crocker v. Wigg**, 5 W.W. & A'B. (M.), 20 (1868), approved. *Ex parte Lucas*, 8 N.S.W. W.N., 33. F.C. (1891).

**Crossley v. Lightowler**, L.R. 3 Eq., 279; 2 Ch., 478 (1866-7), followed. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. C.A. (1875).

**Crux, Abrey v.**, L.R. 5 C.P., 43 (1869), followed. *Frazer v. Hayes*, 6 N.S.W.W.N., 110 (1889).

**Cummins, McCafferty v.**, A.R., 24th June, 1868, examined. *O'Sullivan v. Clarke*, A.R., 2nd Dec., 1868.

**Dalton, Dalton Time Lock Co. v.**, 66 L.T., 704 (1892), followed by *Manning, J. In re Bonang G.M. Co. (Brown's Case)*, 14 N.S.W.L.R. (E.), 262 (1893).

**Dalton Time Lock Co. v. Dalton**, 66 L.T., 704 (1892), followed by *Manning, J. In re Bonang G.M. Co. (Brown's Case)*, 14 N.S.W.L.R. (E.), 262 (1893).

**Davenport's Case** (unreported 1867), distinguished. *Ex parte Mills, In re Mills*, 1 Q.L.J., 1. F.C. (1881).

**Davies, Reg. v.**, 6 W.W. & A'B. (L.), 246 (1869), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Davis v. The Queen**, 6 W.W. & A'B. (E.), 106 (1868-9), over-ruled. *Garibaldi Mining and Crushing Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233. F.C. (1884).

**Dillon, McMillan v.**, 6 V.L.R. (M.), 15 (1880), explained. *Ives v. Lator*, 13 V.L.R., 941; 9 A.L.T., 98 (1887).

**Eardley v. Lord Granville**, 3 Ch. D., 826 (1876), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Ecclesiastical Commissioners for England v. N.E. Railway Co.**, 4 Ch. D., 845 (1877), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Embrey v. Owen**, 6 Ex., 353 (1851), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Emerson, Brisbane Oyster Fishery Co. v.**, Knox, 80 (1877), followed. *Smith v. Campbell*, 7 N.S.W.W.N., 10 (1890).

**Ennor, Hodgkinson v.**, 4 B. & S., 229 (1863), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Extended Hustler's Freehold Co. v. Moore's Hustler's Freehold Co.**, 5 A.J.R., 116 (1874), was over-ruled by *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.), 214. *Per Holroyd, J.*, in *Sims v. Demaniel*, 21 V.L.R., 634; 17 A.L.T., 241; 2 A.L.R., 51. F.C. (1896).

**Farran v. Bowman**, 1 W. & W. (L.), 150 (1862), distinguished. *Maconochie v. Woods*, 2 W. & W. (L.), 250. Banco (1863).

**Fatorial v. Hill**, 8 A.L.T., 87 (1886), dissented from. *Deane v. Gillespie*, 8 A.L.T., 140 (1887).

**Fleming, Peninsular Co. v.**, 27 L.T. (N.S.), 93 (1871-2), distinguished. *Yam Creek, &c., Co. v. Wadham*, 8 S.A.L.R., 141 (1874).

**Flood, Grimley v.**, 9 N.S.W.S.C.R. (L.), 265 (1870), distinguished. *Haughey v. Deane*, 10 N.S.W.S.C.R. (L.), 264. F.C. (1871).

**Ford, Yelta Mining Co. v.**, 3 S.A.L.R., 46 (1869), effect of considered. *Brown v. McLoughlin*, 4 S.A.L.R., 96, at p. 100 (1870).

**Forster v. Hale**, 5 Ves., 308 (1800), followed. *Kennedy v. Currie*, 17 N.S.W.L.R. (E.), 28; 12 W.N., 105 (1896).

**Fothergill's Case**, L.R. 8 Ch., 270 (1873), followed by *Manning, J. In re Bonang G.M. Co. (Browne's Case)*, 14 N.S.W.L.R. (E.), 262 (1893).

**Frederick the Great Tribute Co., Re**, 13 V.L.R., 373 (1887), discussed. *Hancock v. Vanderstoel*, 17 V.L.R., 671. F.C. (1891).

**Gale, Ex parte**, 7 N.S.W.W.N., 93 (1891), distinguished. *Ex parte Travers*, 14 N.S.W. L.R. (L.), 329. F.C. (1893).

**Gee, Attorney-General v.**, 2 W. & W. (E.), 122 (1863), distinguished. *Attorney-General v. Scholes*, 5 W.W. & A'B. (E.), 164 (1868).

**Gibbs v. Guild**, 9 Q.B.D., 59 (1882), approved.



*In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

*Gilmour, Miner v.*, 12 Moo. P.C.C., 131 (1858), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885), distinguished. *McIndoe v. Jutland Flat (Waipori) G.M. Co.*, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

*Gippelander G.M. Co., Guthridge v.*, 5 A.J.R., 161 (1874), over-ruled. *King's Birthday Q.G.M. Co. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885).

*Goldsmith, Clarence United Co. v.*, 8 V.L.R. (M.), 14; 3 A.L.T., 147 (1882), distinguished by *Wrenfordesley, J.*, in *Maa Mon Chin v. Hortin*, 7 A.L.T., 85. F.C., Tasmania (1885).

*Graham, Critchley v.*, 2 W. & W. (L.), 211 (1863), distinguished. *Re Drummond, ex parte Dunbar*, 2 W. & W. (L.), 280. Banco (1863), considered. *Coles v. Sparta*, 3 W.W. & A'B. (M.), 22 (1866); *Warrior G.M. Co. v. Kohinoor G.M. Co.*, 3 W.W. & A'B. (M.), 90 (1866); *Barlow v. Hayes*, 4 W.W. & A'B. (M.), 71 (1867), applied. *Collins v. O'Dwyer*, 5 W.W. & A'B. (M.), 30 (1868), distinguished. *Durant v. Jackson*, 1 V.L.R. (M.), 6 (1875); *Antony v. Dillon*, 15 V.L.R., 240; 10 A.L.T., 231 (1889), considered. *O'Rorke v. Vallancourt*, 1 V.R. (M.), 43; 1 A.J.R., 158 (1870); *Vivian v. Dennis*, 3 W.W. & A'B. (M.), 34 (1866), distinguished. *Cruise v. Crowley*, 5 W.W. & A'B. (M.), 27 (1868), approved. *Woodward v. Earle*, 2 N.Z.J.R., 12 (1874).

*Grand Junction Extended G.M. Co., Volunteer Extended G.M. Co. v.*, 4 W.W. & A'B. (M.), 7 (1867), applied. *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.), 31 (1867); *Great North-West Co. v. Menhennet*, 4 W.W. & A'B. (M.), 63 (1867). *Australasian Co. v. Wilson*, 4 A.J.R., 18 (1873).

*Granville (Earl), Baddeley v.*, 19 Q.B.D., 423 (1887), distinguished. *Shanahan v. Taranganba Proprietary G.M. Co.*, 3 Q.L.J., 147 (1889).

*Granville (Lord), Eardley v.*, 3 Ch. D., 826 (1876), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

*Great North-West Co. v. Sayers*, 4 W.W. & A'B. (M.), 64 (1867), considered. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867).

*Gregory v. Williams*, 3 Mer., 582 (1817), considered. *Foster v. Genowlan Shale Co.*, 16 N.S.W.L.R. (E.), 59; 11 W.N., 142, 182. F.C. (1894-5).

*Grimley v. Flood*, 9 N.S.W.S.C.R. (L.), 265 (1870), distinguished. *Haughey v. Deane*, 10 N.S.W.S.C.R. (L.), 264. F.C. (1871).

*Guild, Gibbs v.*, 9 Q.B.D., 59 (1882), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

*Guthridge v. Gippelander G.M. Co.*, 5 A.J.R., 161 (1874), over-ruled. *King's Birthday Q.G.M. Co. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885).

*Hale, Forster v.*, 5 Ves., 308 (1800), followed. *Kennedy v. Currie*, 17 N.S.W.L.R. (E.), 28; 12 W.N., 105 (1896).

*Harrison, Re, ex parte Pinnegar*, 1 W. & W. (L.), 47 (1861), distinguished. *Carter v. Watson*, 1 W. & W. (L.), 222. Banco (1862).

*Hartley's Case*, L.R. 10 Ch., 157 (1875), followed. *In re Bonang G.M. Co. (Brown's Case)*, 14 N.S.W.L.R. (E.), 347, F.C. (1893), distinguished; *ibid, sub-nom. Smith v. Brown* (1896), A.C., 614. J.C.

*Hassall, Creswick Grand Trunk G.M. Co. v.*, 5 W. W. & A'B. (E.), 49 (1868), distinguished. *Ellson v. Ivanhoe G.M. Co.*, 3 A.L.R., 209. F.C. (1897).

*Hawkin's Hill G.M. Co. v. Briscoe*, 8 N.S.W.L.R. (E.), 123 (1887), distinguished. *South Burrangong G.M. Co. v. Gough*, 15 N.S.W.L.R. (E.), 113; 11 W.N., 52 (1894).

*Hayes, Collins v.*, 6 W. W. & A'B. (M.), 5 (1869), followed. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33 (1887), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242; 6 B.C., 63 (1896).

*Hayes v. Levinson*, 16 V.L.R., 305 (1890), followed. *Carpenter v. Boyce*, 18 A.L.T., 91; 2 A.L.R., 239 (1896).

*Hetherington, Madden v.*, 3 V.R. (L.), 68 (1872),

followed. *Fancy v. North Hurdfield United G.M. Co.*, 8 V.L.R. (M.), 5; 3 A.L.T., 89 (1892).

*Higgins, Melville v.*, 1 W. & W. (L.), 306 (1862), distinguished. *Maconochie v. Woods*, 2 W. & W. (L.), 250. Banco (1863).

*Hill, Fatorial v.*, 8 A.L.T., 87 (1886), dissented from. *Deane v. Gillespie*, 8 A.L.T., 140 (1887).

*Hill, Mason v.*, 5 B. & Ad., 1 (1833), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

*Hilton v. Woods*, L.R. 4 Eq., 432 (1867), followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242; 6 B.C., 63 (1896).

*Hodgkinson v. Ennor*, 4 B. & S., 239 (1863), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

*Homfray, Brough v.*, L.R. 3 Q.B., 771 (1868), considered. *Ex parte Ross*, 17 N.S.W.L.R. (L.), 212; 13 W.N., 3. Banco (1896).

*Hopkins, Bellamy v.*, 19 V.L.R., 34 (1893), approved. *Moe Coal M. Co. v. Lithgow*, 20 V.L.R., 80; 15 A.L.T., 222. F.C. (1894).

*Howe, Borton v.*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97 (1875), followed. *Costello v. O'Donnell*, N.Z. L.R. 1 C.A., 105, C.A. (1882), effect of considered. *McIndoe v. Juland Flat (Waipori) G.M. Co.*, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

*Hughes, Reg. v.*, L.R. 1 P.C., 51 (1865-6), followed. *Osborne v. Morgan, Martin v. Morgan*, 2 Q.L.J., 113. F.C. (1886).

*Hybart v. Parker*, 4 C.B. N.S., 209 (1858), followed. *Gordon v. Gibbons*, 12 N.S.W.S.C.R. (L.), 40. F.C. (1873).

*Jenkins v. Speed*, 6 W.W. & A'B. (L.), 255 (1869), commented upon and dissented from. *Costerfield Co. v. Shaw*, 1 V.R. (M.), 7; 1 A.J.R., 17 (1870).

*Jones v. Bates*, 12 N.S.W.S.C.R. (L.), 284 (1874), followed. *Siddons v. N.S.W. Shale and Oil Co.*, 12 N.S.W.S.C.R. (L.), 364. F.C. (1874).

*Keating, Barker's G.M. Co. v.*, 1 V.R. (M.),

18 (1870), considered. *Frazer v. Hartley*, 7 N.S.W.W.N., 101 (1891).

*Keyse v. Powell*, 2 E. & B., 132 (1853), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

*King v. Melvor*, 4 N.S.W.L.R. (L.), 43 (1882-3), followed. *Hitchins v. Twose*, 9 N.S.W.L.R. (L.), 81; 4 W.N., 160. F.C. (1888).

*Lady Carrington G.M. Co.*, *In re*, 1 N.S.W. B.C., 103 (1891), followed. *In re Brown's Creek G.M. Co.*, 14 N.S.W.L.R. (E.), 24; 3 B.C., 85 (1892).

*Landry v. Burton*, A.R., 28th June, 1862, considered. *Warrior G.M. Co. v. Kokinoor G.M. Co.*, 3 W.W. & A'B. (M.), 90 (1866).

*Lang v. Costin, Molesworth, J.*, unreported, 24th Sept, 1878, followed. *Baker v. Wong Pang*, 8 V.L.R. (M.), 28; 4 A.L.T., 28 (1882).

*Leadbitter, Wood v.*, 13 M. & W., 838 (1845), considered. *Ah Wye v. Locke*, 3 A.J.R., 84 (1872).

*Learmonth v. Morris*, 6 W.W. & A'B. (E.), 74 (1869), considered. *Barclay v. Neeld*, 11 N.S.W. W.N., 9 (1894), followed. *Theodore v. Theodore*, 8 Q.L.J., 76. F.C. (1897).

*Levinson, Hayes v.*, 16 V.L.R., 305 (1890), followed. *Carpenter v. Boyce*, 18 A.L.T., 91; 2 A.L.R., 239 (1896).

*Lightowler, Crossley v.*, L.R. 3 Eq., 279; 2 Ch., 478 (1866-7), followed. *Borton v. Howe*, 3 N.Z.C.A., 5; 2 N.Z.J.R., 97. C.A. (1875).

*Ling, Cawlay v.*, 6 W.W. & A'B. (M.), 12 (1869), followed. *Milne v. Morell*, 3 A.J.R., 21 (1872).

*Litton v. Thornton*, 7 V.L.R. (L.), 4 (1881), commented on. *Eureka Extended Co. v. Allen*, 9 V.L.R. (L.), 341. Banco (1883).

*Lloyd, Seaton v.*, 3 N.Z.J.R. (N.S.) S.C., 107 discussed and considered. *Wilberfoss v. Try Again G.M. Co.*, N.Z.L.R. 2 C.A., 315. C.A. (1884).

*London Chartered Bank, Nolan v.*, 6 N.S.W. W.N., 127 (1890), followed. *Bray v. Bank of Australasia*, 13 N.S.W.W.N., 32 (1896).

**Lovering, Carlyon v.**, 1 H. & N., 784 (1857), considered. **Lomax v. Jarvis**, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Lydal v. Weston**, 2 Atk., 20 (1739), discussed. **Plant v. Rollston**, 6 Q.L.J., 98. F.C. (1894).

**McCafferty v. Cummins**, A.R., 2nd June, 1868, examined. **O'Sullivan v. Clarke**, A.R., 2nd Dec., 1868.

**McClure, Tommy Dodd Co. v.**, 1 V.L.R. (L.), 237 (1875), over-ruled. **Chun Goon v. Reform G.M. Co.**, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**MacDougall, Reg. v.**, 3 V.R. (L.), 66 (1872), followed in **Tommy Dodd Co. v. Patrick**, 5 A.J.R., 14 (1874), F.C. (*Fellows, J., diss.*), and **Tommy Dodd Co. v. McClure**, 1 V.L.R. (L.), 237 (1875), Banco (*Fellows, J. still disapproving*), but over-ruled by **Chun Goon v. Reform G.M. Co.**, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**MacDougall v. Webster**, 2 W.W. & A'B. (L.), 164 (1865), followed. **Theodore v. Theodore**, 8 Q.L.J., 76. F.C. (1897).

**McGallen, Whiteman v.**, 6 W.W. & A'B. (M.), 32 (1869), approved. *Ex parte Lucas*, 8 N.S.W. W.N., 33. F.C. (1891).

**McGill v. Tatham**, unreported, 18th May, 1865, considered and explained. **United Extended Band of Hope Co. v. Tennant**, 3 W.W. & A'B. (M.), 51 (1866).

**MacGregor, Reg. v., ex parte Wilkinson**, 6 V.L.R. (L.), 167 (1880), over-ruled. **King's Birthday Q.G.M. Co. v. Jack**, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885).

**Macintosh, Reg. v.**, unreported, Aug. 3rd, 1850, not followed. **Reg. v. Redhead Coal M. Co.** (No. 2), 7 N.S.W.L.R. (L.), 402; 3 W.N., 60. F.C. (1886).

**McIvor, King v.**, 4 N.S.W.L.R. (L.), 43 (1892-3), followed. **Hitchins v. Twose**, 9 N.S.W. L.R. (L.), 81; 4 W.N., 160. F.C. (1888).

**McKean v. Cleft in the Rock G.M. Co.**, 5 W.W. & A'B. (L.), 42 (1868), considered. **Commercial Bank v. McDonald**, 2 A.J.R., 120. Banco (1871).

**McLean, Trotter v.**, 13 Ch. D., 574 (1879), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**McMillan v. Dillon**, 6 V.L.R. (M.), 15 (1880), explained. **Ives v. Lator**, 13 V.L.R., 941; 9 A.L.T., 98 (1887).

**Madden v. Hetherington**, 3 V.R. (L.), 68 (1872), followed. **Fancy v. North Hurdfield United Co.**, 8 V.L.R. (M.), 5; 3 A.L.T., 89 (1882).

**Makeprang v. Watson**, 2 W.W. & A'B. (L.), 106 (1865), considered. **Barclay v. Neeld**, 11 N.S.W.W.N., 9 (1894), distinguished. **Adams v. D'Outrebande**, 13 N.S.W.W.N., 238. Banco (1897).

**Marshall, Broadbent v.**, 2 W. & W. (E.), 115 (1863), applied. **Astley G.M. Co. v. Cosmopolitan G.M. Co.**, 4 W.W. & A'B. (E.), 96 (1867), affirmed. **Woolley v. Ironstone Hill Lead G.M. Co.**, 1 V.L.R. (E.), 237 (1875).

**Martin v. Porter**, 5 M. & W., 351 (1839), followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Mason v. Hill**, 5 B. & Ad., 1 (1833), considered. **Lomax v. Jarvis**, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Melville v. Higgins**, 1 W. & W. (L.), 306 (1862), distinguished. **Maconochie v. Woods**, 2 W. & W. (L.), 250, Banco (1863).

**Millar v. Wildish**, 2 W. & W. (E.), 37 (1863), followed. **Plant v. Attorney-General**, 5 Q.L.J., 57 (1893), discussed. **Plant v. Rollston**, 6 Q.L.J., 98, F.C. (1894), distinguished. **Broadbent v. Marshall**, 2 W. & W. (E.), 115 (1863); **Attorney-General v. Gee**, 2 W. & W. (E.), 122 (1863), applied. **Star Freehold Co. v. Inkermann and Durham Junction G.M. Co.**, 3 W.W. & A'B. (E.), 181 (1866); **Astley G.M. Co. v. Cosmopolitan G.M. Co.**, 4 W.W. & A'B. (E.), 96 (1867), discussed. **Attorney-General v. Scholes**, 5 W.W. & A'B. (E.), 164 (1868).

**Miner v. Gilmour**, 12 Moo. P.C.C., 131 (1858), considered. **Lomax v. Jarvis**, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33, F.C. (1885), distinguished. **McIndoe v. Julland Flat G.M. Co.**, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

**Missingham v. Smyth**, 8 Q.L.J. (N.C.), 26 (1893), followed. **Dodds v. Parsons**, 8 Q.L.J. (N.C.), 39 (1897).

**Mitten v. Spargo**, 1 V.R. (M.), 22 (1870), followed. **Hunter v. McNulty**, 13 V.L.R., 416; 9 A.L.T., 33 (1887).

**Mongan v. Readford**, 5 N.S.W.L.R. (L.), 363 (1884), explained. **Lucas v. Neald**, 16 N.S.W.L.R. (E.), 257; 12 W.N., 17, 57. F.C. (1895).

**Moonlight Extended Q.M. Co., Clarke v.**, 14 V.L.R., 976 (1888), in part over-ruled. **McDougall v. Moonlight Extended Q.M. Co.**, 14 V.L.R., 987. F.C. (1888).

**Moore's Hustler's Freehold Co., Extended Hustler's Freehold Co. v.**, 5 A.J.R., 116 (1874), was over-ruled by **Parade G.M. Co. v. Royal Harry Q.M. Co.**, 2 V.L.R. (L.), 214 (1876); *Per Holroyd, J.* in **Sims v. Demamiel**, 21 V.L.R., 634; 17 A.L.T., 241; 2 A.L.R., 51. F.C. (1896).

**Morewood, Wood v.**, 3 Q.B., 440 (1841), followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Morgan, Attorney-General v.** (1891), 1 Ch., 432, followed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Morris, Learmonth v.**, 6 W.W. & A'B. (E.), 74 (1869), considered. *Barclay v. Neeld*, 11 N.S.W.W.N., 9 (1894), followed. *Theodore v. Theodore*, 8 Q.L.J., 76. F.C. (1897).

**Munro v. Sutherland**, 5 A.J.R., 75 (1874), approved. *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.), 218. Banco (1876).

**National Debentures, &c., Corporation, In re** (1891), 2 Ch., 505, distinguished. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Nolan v. Annabella G.M. Co.**, 6 W.W. & A'B. (M.), 38 (1869), explained. *Costerfield Co. v. Shaw*, 1 V.R. (M.), 7; 1 A.J.R., 17 (1870).

**Nolan v. London Chartered Bank**, 6 N.S.W.W.N., 127 (1890), followed. *Bray v. Bank of Australasia*, 13 N.S.W.W.N., 32 (1896).

**N.E. Railway Co., Ecclesiastical Commissioners**

*for England v.*, 4 Ch. D., 845 (1877), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Northumberland, Earl of, Reg. v.**, (Case of Mines), 1 Plowd., 310, 336 (1568), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Oakes v. Turquand**, L.R. 2 H.L., 325, at p. 354 (1867), approved. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Oceanic S.N. Co. v. Sutherberry**, 16 Ch. D., 236 (1890), considered. *Hearn v. Central Broken Hill S.M. Co.*, 16 N.S.W.L.R. (E.), 87 (1895).

**Oliver, ex parte, Reg. v. Clow**, 5 W.W. & A'B. (L.), 89 (1868), considered. *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.), 153; 2 A.J.R., 110. Banco (1871).

**Ormerod v. Todmorden Joint Stock Mill Co.**, 52 L.J.Q.B., 445, 450 (1883), distinguished. *McIndoe v. Jutland Flat (Waipori) G.M. Co.*, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

**O'Sullivan v. Aarons**, 5 N.S.W.S.C.R. (L.), 353 (1866), distinguished. *Haughey v. Deane*, 10 N.S.W.S.C.R. (L.), 264. F.C. (1871).

**Owen, Embrey v.**, 6 Ex., 353 (1851), considered. *Lomax v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Parade Co. v. Victoria United Co.**, 3 V.L.R. (E.), 24 (1877), questioned. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54 (1883).

**Parade G.M. Co. v. Royal Harry Q.M. Co.**, 2 V.L.R. (L.), 214 (1876), over-ruled *Extended Hustler's Freehold Co. v. Moore's Hustler's Freehold Co.*, 5 A.J.R., 116 (1874). *Per Holroyd, J.*, in **Sims v. Demamiel**, 21 V.L.R., 634; 17 A.L.T., 241; 2 A.L.R., 51. F.C. (1896).

**Park Co. v. South Hustler's Reserve Co.**, 9 V.L.R. (M.), 4 (1893), followed. *Britannia United Co. v. Victoria United G.M. Co.*, 16 V.L.R., 533; 12 A.L.T., 46 (1890); *Thomas v. Nicholson*, 16 V.L.R., 861, F.C. (1890), dissented from. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Park Gate Iron Co. v. Conates**, L.R. 5 C.P., 634 (1870), followed. *Conway v. Louchard*, 10 V.L.R. (M.), 6; 6 A.L.T., 120 (1884).

**Parker, Hybart v.**, 4 C.B.N.S., 209 (1858), followed. *Gordon v. Gibbons*, 12 N.S.W.S.C.R. (L.), 40. F.C. (1873).

**Patrick, Tommy Dodd Co. v.**, 5 A.J.R., 14 (1874), over-ruled. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**Patterson, Brown v.**, 4 N.S.W.L.R. (E.), 1 (1883), followed. *Stockton Coal Co. v. Fletcher*, 5 N.S.W.W.N., 29. F.C. (1888).

**Pearce, Siehel v.**, unreported, 11th and 12th Sept., 1861, considered. *Clerk v. Wrigley*, 4 W. W. & A'B. (M.), 74 (1867).

**Peel's Case**, L.R. 2 Ch., 674 (1867), approved. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Peninsular Co. v. Fleming**, 27 L.T. (N.S.), 93 (1871-2), distinguished. *Yam Creek, &c., Co. v. Wadham*, 8 S.A.L.R., 141 (1874).

**Pinnegar, ex parte, Re Harrison**, 1 W. & W. (L.), 47 (1861), distinguished. *Carter v. Watson*, 1 W. & W. (L.), 222. Banco (1862).

**Plant v. Attorney-General**, 5 Q.L.J., 57 (1893), over-ruled. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (*Harding, J., diss.*), (1894).

**Porter, Martin v.**, 5 M. & W., 351 (1839), followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Powell, Keyse v.**, 2 E. & B., 132 (1853), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Readford, Mongan v.**, 5 N.S.W.L.R. (E.), 383 (1884), explained. *Lucas v. Neeld*, 16 N.S.W.L.R. (E.), 257; 12 W.N., 17, 57. F.C. (1895).

**Redman, Ex parte**, unreported, June, 1867, commented on and distinguished. *Bacon v. Rebora*, 12 N.S.W.S.C.R. (L.), 134 (1873); *Tornaghi v. Bacon*, 12 N.S.W.S.C.R. (L.), 144. Banco (1873).

**Reg. v. Brewer**, 4 W.W. & A'B. (L.), 124 (1867), over-ruled. *Moore v. White*, 4 A.J.R., 17 (1873).

**Reg. v. Clarke**, 7 Moo. P.C., 77 (1849-51), commented on and explained. *Reg. v. Hughes*, L.R. 1 P.C., 81. J.C. (1865-6).

**Reg. v. Clow, ex parte Oliver**, 5 W.W. & A'B. (L.), 89 (1868), considered. *Reg. v. Heron, ex parte Bryer*, 2 V.R. (L.), 155; 2 A.J.R., 110. Banco (1871).

**Reg. v. Cooper**, 7 N.S.W.L.R. (L.), 15; 2 W.N., 59 (1886), followed. *Attorney-General v. Boyle*, 14 N.S.W.L.R. (L.), 424; 10 W.N., 67. Banco (1893).

**Reg. v. Cribb**, 2 Q.L.J., 157 (1886), approved. *Williams v. Morgan*, 13 App. Cas., 239. J.C. (1888).

**Reg. v. Davies**, 6 W.W. & A'B. (L.), 246 (1869), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Reg. Davis v.**, 6 W.W. & A'B. (E.), 106 (1868), over-ruled. *Garibaldi Mining and Crushing Co. v. Craven's New Chum Co.*, 10 V.L.R. (L.), 233. F.C. (1884).

**Reg. v. Hughes**, L.R. 1 P.C., 51 (1865-6), followed. *Osborne v. Morgan, Martin v. Morgan*, 2 Q.L.J., 113. F.C. (1886).

**Reg. v. MacDougall**, 3 V.R. (L.), 66 (1872), followed in *Tommy Dodd Co. v. Patrick*, 5 A.J.R., 14 (1874), F.C. (*Fellows, J., diss.*), and *Tommy Dodd Co. v. McClure*, 1 V.L.R. (L.), 237 (1875), Banco (*Fellows, J., still disapproving*), but over-ruled by *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**Reg. v. MacGregor, ex parte Wilkinson**, 6 V.L.R. (L.), 167 (1880), over-ruled. *King's Birthday Q.G.M. Co. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885).

**Reg. v. Macintosh** (unreported), Aug. 3rd, 1850, not followed. *Reg. v. Redhead Coal M. Co.* (No. 2), 7 N.S.W.L.R. (L.), 402; 3 W.N., 60. F.C. (1886).

**Reg. v. Northumberland, Earl of (Case of Mines)**, 1 Plowd., 310, 336 (1568), discussed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893); *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Reg. v. St. Olave**, 8 E. & B., 529 (1857), considered. *Colonial Bank v. Willan*, L.R. 5 P.C., 417. J.C. (1874).

**Reg. v. Thompson, ex parte Costin**, 4 V.L.R. (L.), 512 (1878), explained. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174 (1887), discussed. *Hancock v. Vanderstoel*, 17 V.L.R., 671. F.C. (1891).

**Richards, Chasemore v.**, 7 H.L.C., 349 (1859), considered. *Lomaz v. Jarvis*, 6 N.S.W.L.R. (L.), 237; 2 W.N., 33. F.C. (1885).

**Ricketson v. Barbour, Knox**, 72 (1877), dictum in disapproved. *Ex parte Penniment*, 12 N.S.W. L.R. (L.), 68; 7 W.N., 129. F.C. (1891).

**Robinson, Williams v.**, 12 N.S.W.L.R. (E.), 34 (1890), discussed. *Re Keith, ex parte Joss*, 7 N.S.W.B.C., 75 (1897).

**Royal British Bank v. Turquand**, 6 E. & B., 327 (1855), considered. *Re Tyson's Reef Co., ex parte Holmes*, 3 W. W. & A'B. (L.), 162. Banco (1866).

**Royal Harry Q.M. Co., Parade G.M. Co. v.**, 2 V.L.R. (L.), 214 (1876), over-ruled. *Extended Hustler's Freehold Co v. Moore's Hustler's Freehold Co.*, 5 A.J.R., 116 (1874). *Per Holroyd, J.*, in *Sims v. Demamiel*, 21 V.L.R., 634; 17 A.L.T., 241; 2 A.L.R., 51. F.C. (1896).

**Sadler v. Worley** (1894), 2 Ch., 177, followed. *Poyser v. Mt. Shamrock G. Co.*, 6 Q.L.J., 276 (1895).

**St. Olave, Reg. v.**, 8 E. & B., 529 (1857), considered. *Colonial Bank v. Willan*, L.R. 5 P.C., 417. J.C. (1874).

**Sayers, Great North-West Co. v.**, 4 W. W. & A'B. (M.), 64 (1867), considered. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867).

**Seaton v. Lloyd**, 3 N.Z.J.R. (N.S.) S.C., 107, discussed and considered. *Wilberfoss v. Try Again G.M. Co.*, N.Z.L.R. 2 C.A., 315. C.A. (1884).

**Selfe v. Colonial Ice Co.**, 10 N.S.W.W.N., 153 (1894), distinguished. *South Burrangong G.M. Co. v. Gough*, 15 N.S.W.L.R. (E.), 113; 11 W.N., 52 (1894).

**Shotover Terrace G.M. Co. v. Armstrong**, 1 N.Z.J.R. (N.S.) S.C., 95, dictum of *Williams, J.*, not followed. *Seaton v. Lloyd*, 3 N.Z.J.R. (N.S.) S.C., 107.

**Sichel v. Pearce**, unreported, 11th and 12th Sept., 1861, considered. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867).

**Simpson, Alexander v.**, 43 Ch. D. 139 (1889), distinguished. *In re Katoomba Coal and Shale Co. (North's Case)*, 13 N.S.W.L.R. (E.), 70 (1892).

**Skidmore, Caddick v.**, 2 De G. & J., 52 (1857), distinguished. *Kennedy v. Currie*, 17 N.S.W. L.R. (E.), 28; 12 W.N., 105 (1896).

**Smyth, Missingham v.**, 8 Q.L.J. (N.C.), 26 (1893), followed. *Dodds v. Parsons*, 8 Q.L.J. (N.C.), 39 (1897).

**South Hustler's Reserve Co., Park Co. v.**, 9 V.L.R. (M.), 4 (1883), followed. *Britannia United Co. v. Victoria United G.M. Co.*, 16 V.L.R., 533; 12 A.L.T., 46 (1890). *Thomas v. Nicholson*, 16 V.L.R., 861, F.C. (1890), dissented from. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Spargo, Mitten v.**, 1 V.R. (M.), 22 (1870), followed. *Hunter v. McNulty*, 13 V.L.R., 416; 9 A.L.T., 33 (1887).

**Speed, Jenkins v.**, 6 W. W. & A'B. (L.), 255 (1869), commented upon and dissented from. *Costerfield Co. v. Shaw*, 1 V.R. (M.), 7; 1 A.J.R., 17 (1870).

**Stanley, Ex parte**, 4 De G.J. & S., 407; 33 L.T. (N.S.), 536 (1864), approved. *In re Talisker M. Co., Bank of South Australia v. Abrahams*, L.R. 6 P.C., 265; 9 S.A.L.R., 246, J.C. (1875). See also *Ansted v. Land Co. of Australia*, 14 N.S.W.L.R. (E.), 330 (1893).

**Steward v. Blakeaway**, L.R. 6 Eq., 479; 4 Ch., 600 (1868-9), approved. *Meyenberg v. Pattison*, 3 Q.L.J., 184. F.C. (1889).

**Sutherland, Oceanic S.N. Co. v.**, 16 Ch. D., 236 (1880), considered. *Hearn v. Central Broken Hill S.M. Co.*, 16 N.S.W.L.R. (E.), 87 (1895).

**Sutherland, Munro v.**, 5 A.J.R., 75 (1874), approved. *Parade G.M. Co. v. Royal Harry Q.M. Co.*, 2 V.L.R. (L.), 218. Banco (1876).

**Tatham, McGill v.**, unreported, 18th May, 1865, considered and explained. *United Ex-*

*tended Band of Hope Co. v. Tennant*, 3 W.W. & A'B. (M.), 51 (1866).

**Tennant, United Extended Band of Hope Co. v.**, 3 W.W. & A'B. (M.), 41 (1866), considered. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867), examined. *O'Sullivan v. Clarke*, A.R., 2nd Dec., 1868, explained. *United Working Miners' G.M. Co. v. Albion G.M. Co.*, 4 W.W. & A'B. (M.), 1 (1867).

**Thompson, Reg. v., ex parte Costin**, 4 V.L.R. (L.), 512 (1878), distinguished and explained. *Re Frederick the Great Tribute Co.*, 13 V.L.R., 373; 8 A.L.T., 174 (1897), discussed. *Hancock v. Vanderstoel*, 17 V.L.R., 671. F.C. (1891).

**Thornton, Litton v.**, 7 V.L.R. (L.), 4 (1881), commented on. *Eureka Extended Co. v. Allen*, 9 V.L.R. (L.), 341. Banco (1883).

**Todmorden Joint Stock Mill Co., Ormerod v.**, 52 L.J.Q.B., 445, 450 (1883), distinguished. *McIndoe v. Julland Flat (Waipori) G.M. Co.*, 12 N.Z.L.R., 226; 14 N.Z.L.R., 99. C.A. (1892-3-5).

**Tommy Dodd Co. v. McClure**, 1 V.L.R. (L.), 237 (1875), over-ruled. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**Tommy Dodd Co. v. Patrick**, 5 A.J.R., 14 (1874), over-ruled. *Chun Goon v. Reform G.M. Co.*, 8 V.L.R. (E.), 128; 3 A.L.T., 137. F.C. (1882).

**Trotter v. McLean**, 13 Ch. D., 574 (1879), approved. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Turquand, Oakes v.**, L.R. 2 H.L., 325, at p. 354 (1867), approved. *Homeward Bound G.M. Co. v. McPherson*, 17 N.S.W.L.R. (E.), 281, 289 (1895).

**Turquand, Royal British Bank v.**, 6 E. & B., 327 (1855), considered. *Re Tyson's Reef Co., ex parte Holmes*, 3 W.W. & A'B. (L.), 162. Banco (1866).

**United Extended Band of Hope Co., Chisholm v.**, 4 W.W. & A'B. (M.), 31 (1867), applied. *Great North-West Co. v. Menhennet*, 4 W.W. & A'B. (M.), 63 (1867).

**United Extended Band of Hope Co. v. Tennant**,

3 W.W. & A'B. (M.), 41 (1866), considered. *Clerk v. Wrigley*, 4 W.W. & A'B. (M.), 74 (1867), examined. *O'Sullivan v. Clarke*, A.R., 2nd Dec., 1868, explained. *United Working Miners' G.M. Co. v. Albion G.M. Co.*, 4 W.W. & A'B. (M.), 1 (1867).

**Vickery, Bucknell v.**, 5 N.S.W.L.R. (E.), 81 (1884), followed. *Stockton Coal Co. v. Fletcher*, 5 N.S.W.W.N., 29. F.C. (1888).

**Victoria United Co., Parade Co. v.**, 3 V.L.R. (E.), 24 (1877), questioned. *Donaldson v. Llanberis Co.*, 9 V.L.R. (M.), 21; 5 A.L.T., 54 (1883).

**Volunteer Extended G.M. Co. v. Grand Junction Extended G.M. Co.**, 4 W.W. & A'B. (M.), 7 (1867), applied. *Chisholm v. United Extended Band of Hope Co.*, 4 W.W. & A'B. (M.), 31 (1867). *Great North-West Co. v. Menhennet*, 4 W.W. & A'B. (M.), 63 (1867). *Australasian Co. v. Wilson*, 4 A.J.R., 18 (1873).

**Wakeham v. Cobham**, 1 A.J.R., 93 (1870), applied. *Reg. v. Dowling, ex parte McLean*, 2 A.J.R., 56, Banco (1871), not followed. *Wilkinson v. Harris*, 9 N.S.W.L.R. (L.), 70; 4 W.N., 159. F.C. (1888).

**Ward v. Berndston**, 8 N.Z.L.R., 21 (1889). *See Wellington City Council v. Stains*, 10 N.Z. L.R., 329. C.A. (1891).

**Watson, Makeprang v.**, 2 W.W. & A'B. (L.), 106 (1865), considered. *Barclay v. Neeld*, 11 N.S.W.W.N., 9 (1894), distinguished. *Adams v. D'Outrebande*, 13 N.S.W.W.N., 238. Banco (1897).

**Webster, McDougall v.**, 2 W.W. & A'B. (L.), 164 (1865), followed. *Theodore v. Theodore*, 8 Q.L.J., 76. F.C. (1897).

**Weston, Lydal v.**, 2 Atk., 20 (1739), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Whinney, Colonial Bank v.**, 11 App. Cas., 426 (1886), approved. *Re Keith, ex parte Joss*, 7 N.S.W.B.C., 75 (1897).

**Whiteman v. McGallan**, 6 W.W. & A'B. (M.), 32 (1869), approved. *Ex parte Lucas*, 8 N.S.W. W.N., 33. F.C. (1891).

**Wigg, Crocker v.**, 5 W.W. & A'B. (M.), 20 (1868), approved. *Ex parte Lucas*, 8 N.S.W. W.N., 33. F.C. (1891).

**Wildish, Millar v.** 2 W. & W. (E.), 37 (1863), followed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893), discussed. *Plant v. Rollston*, 6 Q.L.J., 98, F.C. (1894), distinguished. *Broadbent v. Marshall*, 2 W. & W. (E.), 115 (1863); *Attorney-General v. Gee*, 2 W. & W. (E.), 122 (1863); applied. *Star Freehold Co. v. Inkerman and Durham Junction G. M. Co.*, 3 W. W. & A'B. (E.), 181 (1866); *Astley G.M. Co. v. Cosmopolitan G.M. Co.*, 4 W.W. & A'B. (E.), 96 (1867), discussed. *Attorney-General v. Scholes*, 5 W. W. & A'B. (E.), 164 (1868).

**Wilkinson, ex parte, Reg. v. MacGregor**, 6 V.L.R. (L.), 167 (1880), over-ruled. *King's Birthday Q.G.M. Co. v. Jack*, 11 V.L.R., 197; 6 A.L.T., 275. F.C. (1885).

**Williams, Gregory v.**, 3 Mer., 582 (1817), considered. *Foster v. Genowlan Shale Co.*, 16 N.S.W.L.R. (E.), 59; 11 W.N., 142, 182. F.C. (1894-5).

**Williams v. Robinson**, 12 N.S.W.L.R. (E.), 34 (1890), discussed. *Re Keith, ex parte Joss*, 7 N.S.W.B.C., 75 (1897).

**Wood v. Leadbitter**, 13 M. & W., 838 (1845), considered. *Alh Wye v. Locke*, 3 A.J.R., 84 (1872).

**Wood v. Morewood**, 3 Q.B., 440 (1841), fol-

lowed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242 (1896).

**Woods, Hilton v.**, L.R. 4 Eq., 432 (1867), followed. *In re Bulli Coal M. Co. (Osborne's Case)*, 17 N.S.W.L.R. (E.), 242; 6 B.C., 63 (1896).

**Woodward, Ex parte**, unreported, 13th Dec., 1871, commented on and distinguished. *Bacon v. Rebora*, 12 N.S.W.S.C.R. (L.), 134 (1873); *Tornaghi v. Bacon*, 12 N.S.W.S.C.R. (L.), 144. Banco (1873).

**Woolley v. Attorney-General**, 2 App. Cas., 163 (1877), followed. *Plant v. Attorney-General*, 5 Q.L.J., 57 (1893), discussed. *Plant v. Rollston*, 6 Q.L.J., 98. F.C. (1894).

**Worley, Sadler v.** (1894), 2 Ch., 177, followed. *Poyser v. Mt. Shamrock G. Co.*, 6 Q.L.J., 276 (1895).

**Wright, Bourke v.**, 3 N.S.W.L.R. (L.), 145 (1882), explained. *Bourke v. Lucas*, 3 N.S.W.L.R. (L.), 217. Banco (1882).

**Wrigley, Clerk v.**, 4 W.W. & A'B. (M.), 74 (1867), examined. *O'Sullivan v. Clarke*, A.R. 2nd Dec., 1868.

**Yelta M. Co. v. Ford**, 3 S.A.L.R., 46 (1869), effect of considered. *Brown v. McLoughlin*, 4 S.A.L.R., 96, at p. 100 (1870).



## APPENDIX.



## APPENDIX OF MINING CASES DECIDED IN TASMANIA.

[This Appendix has been compiled from Hore's "Digest of Tasmanian Cases 1856-1896" (Hobart, 1897), with the permission of the publishers, the Southern Law Society of Tasmania. The numbers after the names of the cases refer to the columns of that work.]

1.—By-laws and Regulations—Mining Regulations mandatory, not imperative—Notice will not be held invalid for unintentional and immaterial error.]-*Maa Mon Chin v. Hortin*, 73, 7 A.L.T., 85, Oct. 7th, 1885; *Chapman v. Pratt*, 78, May 2nd, 1883; *Carlisle v. Thorne*, 78, March 30th, 1882; *Raynor v. Curtis*, 78, Nov. 27th, 1891; *Crosby v. King and Fitzgerald*, 78, July 19th, 1881; *Kennot v. Burkitt*, 78; *Karlson v. Harris*, 79, Nov. 24th, 1896; and see these cases for instances of notices with immaterial errors.

2.—Regulation 12—Obligation to blaze tree.]-*Hortin v. Chapman*, 79. Sept. 19th, 1892.

3.—Regulation 12—Tree to mark claim must be cut—Scraping bark off and affixing envelope held insufficient.]-*Harvey v. Taylor*, 79. May 1st, 1889.

4.—Regulations—Labour charges—Proof of non-compliance with—Evidence must be certain to work forfeiture.]-*Zeppen v. Leslie*, 79. April 26th, 1887.

5.—Company—Calls on shares—Liability dates from resolution—Refusal to register transfer after resolution.]-*Re Ruby Extended T.M. Co.*, 18. July 28th, 1882.

6.—Company—Notice of calls—When irregularity in may be waived by conduct of party receiving notice.]-*Ruby Extended T. Mine v. Woolcott*, 18. July 6th, 1890.

7.—Company—Liability to dividend duty—43 Vic. No. 12, secs. 2, 3—Company does not cease to exist till wound up—Mere sale of its property does not end its existence.]-*Commissioner of Real Estate Duty v. Argent S.M. Co.*, 19, 20. Dec. 6th, 1890.

8.—Company—43 Vic. No. 12, secs. 2, 3—48 Vic. No. 15—Dividend—Money payable out of capital—Return of money paid for calls held to be a payment out of capital.]-*In re Silver Queen S.M. Co.*, 20.

9.—Company—48 Vic. No. 15, sec. 10—Registration of shares—Non-payment of illegal calls—Consent necessary to person becoming shareholder.]-*Grubb v. East Clarence G.M. Co.*, 20. April 3rd, 1896.

10.—Company—48 Vic. No. 15, sec. 30—Transfer of equitable interests not appearing on register—Act does not forbid creation of equitable interests between the shareholder and third parties.]-*Stewart v. Crotty*, 20. Nov. 16th, 1888.

11.—Company—33 Vic. No. 3, secs. 27, 46—Appointment of directors—When may be done before incorporation.]-*Tasmania Extended G. M. Co. v. McCarron*, 20, 21. Sept. 21st, 1880.

12.—Company—Transfer of property to another company formed for different objects but consisting of same members—Not a reconstruction, therefore transfer of leases must be stamped under the Stamp Duties Amendment

Act 1882—"Stock"—What is.]-*Mount Lyell M. and Railway Co. v. Crown*, 21. May 5th, 1893.

13.—Company—Bound by share register whether consideration given for shares be legal or otherwise.]-*In re West Volunteer G.M. Co.*, 21. April 19th, 1895.

14.—Company—Power to wind up voluntarily ceases on want of quorum of directors.]-*In re Fingal Quartz Crushing Co. Ltd.*, 22. March 6th, 1872.

15.—Fraud—Relief granted only where claimant is free from fraud himself—Defence of *in pari delicto*—How raised—Shares obtained by fraudulent misrepresentations.]-*Dixon v. Henry*, 42, 43. July 23rd, 1896.

16.—Income Tax—58 Vic. No. 16, sub-sec. 2—Mining company only liable on dividends declared.]-*Re Income Tax Appeals*, 46. Nov. 27th, 1895.

17.—Income Tax—58 Vic. No. 16, sec. 23, sub-sec. 2—Mining company—Money set apart solely for developing mine—Construction of railway under private act by company to carry passengers and goods, although primarily for development of mine, not within exemption.]-*In re Mt. Lyell Co.*, 46, 47. March 3rd, 1895.

18.—Income Tax—59 Vic. No. 20, sec. 5—Depreciation of capital—Includes mining shares.]-*Re Income Tax Appeals*, 48. Nov. 23rd, 1895.

19.—Income Tax—59 Vic. No. 20, sec. 8—Mining company—Sale of property—Profit made by, not income.]-*In re Mount Reid*, 49. Aug. 19th, 1896.

20.—Lateral support—Adjoining miners entitled to support not only of surface but of soil underneath—Right not affected by skilful working of mine nor by fact that damage due to previous workings by former proprietor.]-*Briscoe T.M. Co. v. New Brothers' Home*, 36. May 27th, 1891; Dec. 9th, 1891.

21.—Lease—46 Vic. No. 20—Supreme Court has no original jurisdiction to grant although appeal lies to it from refusal of commissioner to grant.]-*Omant v. Stephen*, 75, 76. Nov. 24th, 1891. See 57 Vic. No. 24, sec. 34.

22.—Applicant for lease—Cannot bring action for trespass before application for lease granted.]-*Omant v. Stephen*, 76. Nov. 24th, 1891.

23.—Lease—Objection may be made to grant of after consent of Governor—Mineral Lands Act 1884—Reg. 7.]-*In re Robinson*, 76, 77. May 9th, 1882.

24.—Lease—47 Vic. No. 10, secs. 43, 45, 48—Silver lease—Permit to another to mine for gold on same land—Permit may only be used as long as lessee is not interfered with or obstructed.]-*Mt. Reid S.M. Co. v. Johnson*, 77. July 3rd, 1893. See 57 Vic. No. 24, sec. 136.

25.—Lease—Injunction to restrain granting does not lie against commissioner—Powers and duties of Governor in granting.]-*McDonald v. O'Reilly*, 77. May 3rd, 1877.

26.—Lease—Mineral Leases Act 1870, sec. 10—Mere averment of Attorney-General not sufficient to avoid.]-*In re Stewart*, 77. Sept. 1st, 1876.

27.—Lease—Forfeiture in discretion of Minister—Mandamus will not lie against proper exercise of discretion—No jurisdiction in Supreme Court to either forfeit or grant lease.]-*Re Commissioner of Mines*, 77, 78. July 15th, 1896.

28.—Lease—Application for—57 Vic. No. 24, sec. 147—Decision of commissioner binding on all parties, including Minister for Mines.]-*Roseberry G.M. Co. v. Minister of Mines*, 78. July 13th, 1895.

29.—Lease—Regulation 69—Excess in marking application for claim—When application for lease of excess may be made.]-*Pearce v. Madden*, 79. Sept. 4th, 1884.

30.—Lease—Failure of applicant to complete application through death—Preference given to partner to complete—57 Vic. No. 24, sec. 43—Regulation 94.]-*In re Whyte, Thomas v. Commissioner of Lands*, 80. July 24th, 1896.

31.—Partnership in land distinct from partnership in minerals won.]-*Sunki v. Simpson*, 87. Dec. 7th, 1888.

32.—Partnership must be fully proved under Mining Act 1893 (57 Vic. No. 24), sec. 150.]-*Burns v. McKimmie*, 78. Nov. 23rd, 1895.

33.—Practice—Amendment of defect in marking out—Cannot include land not applied for—Regulation 75.]-*Plant v. Harris*, 79, 80. Nov. 24th, 1896.

**34.—Practice—Appeal from Commissioner in Bankruptcy in Launceston—To what Courts should be made—Mining Companies Act (48 Vic. No. 15), sec. 37.]—*Foley Comet P.A. v. Bateman*, 75. May 11th, 1891.**

**35.—Practice—Mineral Appeals Regulation Act (46 Vic. No. 20)—No appeal under to Privy Council.]—*Hudson v. Mt. Reid S.M. Co.*, 75. Sept. 16th, 1893. See 57 Vic. No. 24, sec. 165.**

**36.—Practice—Leave to appeal—Application for under 46 Vic. No. 20 must be promptly made—Costs.]—*Mt. Reid S.M. Co. v. Johnson*, 76. Aug. 28th, 29th, 1893; Sept. 6th, 1893; Sept. 23rd, 1893.**

**37.—Practice—Costs—Photographs in mining cases.]—*Briseis T.M. Co. v. New Brothers' Home*, 26. Dec. 9th, 1891.**

**38.—Practice—Mandamus—Does not lie against public officer with discretion—Minister of Mines.]—*In re Commissioner of Mines*, 77, 78. July 15th, 1896.**

**39.—Practice—Mandamus may be granted in**

**simple cases where quo warranto would more properly lie.]—*In re Warden of New Norfolk*, 71. July 18th, 1896.**

**40.—Practice—Special case—Parties agreeing to case stated bound by case, whether there be power to state case or not.]—*Mt. Reid Co. v. Johnson*, 14, 76. Sept. 6th, 1893.**

**41.—Trespass—Bare intrusion on Queen's possession in law and fact, not sufficient foundation for trespass quare clausum fregit.]—*Crowther v. Askunas*, 116. Nov. 26th, 1891.**

**42.—Water—Riparian proprietor entitled to both ordinary and extraordinary use of water flowing past land so long as rights of other riparian proprietors, both above and below, are not interfered with.]—*Derry T.M. Co. v. Garibaldi T.M. Co.*, 36, 11 A.L.T., 115. May 28th, 1889.**

**43.—Water-race—Obligations of owner—Rights of—Support by adjacent land.]—*North Brothers' Home v. Triangle Co.*, 36. April 22nd, 1884.**

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